(23,705)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 177.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print
Assignment of errors	1	1
Stipulation as to parts of record to be printed	4	2
Complaint	5	3
Answer	7	4
Bill of exceptions	13	8
Exhibit "1"—Stipulation as to trial of case	14	8
Jury waived	15	9
Evidence for defendant	15	9
Testimony of F. W. Getty	15	9
Frank M. Bostwick	34	22
J. A. M. Sloan	48	31
Thomas R. Crowder	67	44
Defendant rests	94	62
Motion of plaintiff to strike out denied	94	62
Plaintiff rests	94	62
Reporter's certificate to testimony	95	62
Findings of fact and conclusions of law requested by plaintiff	95	62
Findings of fact and conclusions of law by the court	96	63
Plaintiff's exceptions	98	64
Opinion of lower court	99	65
Judgment of lower court	101	66
Judgment of Supreme Court	103	67

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1914.

1 Supreme Court of the United States, October Term, 1912.

No. 1130.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, Defendant Below,

vs.

STATE OF WISCONSIN, Defendant in Error, Plaintiff Below.

The plaintiff in error will rely upon all the errors filed by it, to-wit:

I.

The Court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied," deprives plaintiff in error of liberty without due process of law and is void under the Fourteenth Amendment of the Constitution of the United States.

II.

The Court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied,"

deprives plaintiff in error of its property without due process
2 of law and is void under the Fourteenth Amendment to the Constitution of the United States.

III.

The Court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied," denies to plaintiff in error the equal protection of the laws and is void under the Fourteenth Amendment to the Constitution of the United States.

IV.

The Court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied," takes its property for public use without compensation and is void under the Fourteenth Amendment to the Constitution of the United States.

V.

The Court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied," is a regulation of commerce among the states and is void under Section 8 of Article 1 of the Constitution of the United States.

3 VI.

The Court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied," is not in conflict with the Interstate Commerce Act and the action thereunder of the Interstate Commerce Commission and is therefore void.

C. H. VAN ALSTINE,
Attorney for Plaintiff in Error.

4 Supreme Court of the United States, October Term, 1912.

No. 1130.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, Defendant Below,
vs.
STATE OF WISCONSIN, Defendant in Error, Plaintiff Below.

Both parties think that it is necessary to print so much of the record as is attached to this stipulation.

Dated June 24, 1913.

C. H. VAN ALSTINE,
Attorney for Plaintiff in Error.
WALTER C. OWEN,
Attorney General of Wisconsin.

Writ of Error to Review the Final Judgment of the Supreme Court of Wisconsin holding that Chapter 272 Laws of Wisconsin for the Year 1911 is Not Unconstitutional and Void by Reason of the Fourteenth Amendment to the Constitution of the United States nor by Reason of Section 8 of Article 1 of the Constitution of the United States, nor by Reason of the *U*nterstate Commerce Act and the Action of the Commission Thereunder.

The complaint, omitting title, is as follows:

The State of Wisconsin for cause of action against said defendant alleges:

That this action was begun and is maintained with the consent and at the request of the Governor of said State.

That the defendant is, and at the times hereinafter referred to was, a railroad corporation duly organized under the laws of the
6 State of Wisconsin for the purpose, among others, of operating a railroad therein for public use and the conveyance of persons and property for hire, and was during said times and is engaged in operating the same, and was and is engaged in operating a system of sleeping cars in connection therewith and as part thereof, which said cars are constructed according to the usual design, having sections containing upper and lower berths.

That one of the lines of said railway company passes through and extends between the cities of Portage and Star Lake, in said state, known as the "Valley Division" of said road.

That on, to-wit, the 17th day of August, 1911, one James P. Hall, having purchased from defendant, at Madison, Wisconsin, a regular first-class passenger ticket, from Madison to Star Lake, Wisconsin, over defendant's line, boarded one of the regular passenger trains of said company at Portage during the evening of said day, which said train ran between said cities of Portage and Star Lake, the latter point being its destination; and on said train duly applied for, purchased and engaged from the conductor in charge thereof, for the night of said day, the lower berth of section number 11 in the sleeping car known by the name of "Waubeno," which said car was a part of said train, and which said berth was occupied by him during the night of said day on said trip between said cities.

That, notwithstanding, the fact that the upper berth of said section 11 was neither engaged nor occupied between said cities nor during said night or any part thereof, the same did not remain closed but was let down and kept down between said cities and during all of said night by the porter and conductor thereof as required, permitted and suffered by the defendant.

That thereby the defendant became indebted in the amount of fifty dollars to the State of Wisconsin; whereby an action accrues according to the provisions of section 1636*p* of the Wisconsin
7 Statutes, known as Chapter 272 of the Laws of 1911, an act relating to sleeping car berths.

Wherefore plaintiff demands judgment against said defendant

for the sum of fifty dollars, together with its costs and disbursements herein.

L. H. BANCROFT,
Attorney General of Wisconsin,
RUSSELL JACKSON,
Deputy Attorney General of Wisconsin,
Plaintiffs Attorneys.

The answer, omitting title, reads as follows:

And now comes the above named defendant, and for answer to the complaint of the plaintiff herein, says:

First. It admits that each and every allegation in said complaint is true, except the following allegation thereof:

"That thereby the defendant became indebted in the amount of $50.00 to the State of Wisconsin; whereby an action accrued according to the provisions of Section 1636*p* of the Wisconsin Statutes known as Chapter 272 of the Laws of 1911, an Act Relating to Sleeping Car Berths."—

which said allegation this defendant denies.

Second. For a defense, the defendant alleges that the sleeping car "Waubeno" mentioned in said complaint is so constructed as that it is divided into sleeping car units, as are all the sleeping cars in use in the United States, which said units consist of lower berths, upper berths, sections, drawing rooms and compartments; and that said lower berth units and said upper berth units are so constructed and arranged that when prepared for occupancy each of said units is a compartment separated from all other space in the car; that the charge for the use of each of said unit of sleeping car space, whether it be a lower berth or an upper berth, or a section, or a compartment, or a drawing room, is prescribed and fixed by tariffs which are promulgated, published and filed as required by the laws of the
8 State of Wisconsin and by the laws of the other states in which defendant operates its lines of railway and sleeping cars, and as is required by an Act of Congress popularly known as the Interstate Commerce Act, which said rates of charge so made, filed and promulgated under the laws of said states, and under said Interstate Commerce Act, are the lawful rates of charge which the defendant is required to charge and collect, and which the user of any such unit of sleeping car space is required to pay; that the charge as prescribed by defendant's tariff on file with the Railroad Commission of Wisconsin, and in force on the 17th day of August, 1911, for the use of a lower berth from Portage, Wisconsin, to Star Lake, Wisconsin, was $1.50; and for the use of an upper berth between said cities, $1.20; and for the use of a section between said cities, $2.70; that under the rules prescribed and promulgated in said tariff so filed with said Commission, the said James P. Hall, mentioned in the complaint, could have secured and had the use of Section No. 11 in said sleeping car Waubeno by the payment of said lawful rate of charge, to wit: $2.70; that said Hall, while demanding of the defendant's conductor that the upper berth be put back and kept there, so that he might have the use of the entire

section, paid for the use of the lower berth only, to-wit: the sum of $1.50; that at no time did he pay or offer to pay the tariff rate prescribed for the use of the whole of said Section No. 11; that said sleeping car Waubeno, during the months of June, July, August, September and October, 1911, was operated daily between Chicago, Illinois, and Star Lake, Wisconsin; that said car Waubeno was hauled by, and was part of an interstate train, namely, a train that ran daily from Chicago, Illinois, through Portage, Wisconsin, to New Lisbon, Wisconsin, and points beyond Wisconsin; and on the evening of said August 17, 1911, as well as on each trip that said car Waubeno made in the same direction, during the aforesaid months, it was taken up at said New Lisbon by, and made part of, a train which ran daily between said New Lisbon and Star Lake;
9 that on its said interstate trips during said months, and on said 17th day of August, 1911, and while so employed in interstate commerce, said car Waubeno also carried passengers, and furnished them sleeping accommodations, between points in the State of Wisconsin, that is, between Portage and Star Lake, and between other places in the State of Wisconsin, and that such commingling of state and interstate passengers was necessary to the economical rendering of sleeping car service; that in addition to said sleeping car Waubeno, another sleeping car was operated between Chicago, Illinois, and Star Lake, Wisconsin, during the night of August 17, 1911, and was hauled by, and was part of the same train that hauled said sleeping car Waubeno on the evening of said 17th day of August, 1911; that all of the berths, both lower and upper, of said other sleeping car were engaged and occupied by passengers, state and interstate, during that evening; and all of the lower berths (twelve in number) and all of the upper berths of said sleeping car Waubeno, with the exception of five, were engaged and occupied by passengers, state and interstate, during that evening; that, with few exceptions, all of the lower berths and more than one-half of the upper berths of said car Waubeno were so occupied during each of its daily trips between Chicago and Star Lake during the aforesaid months of June, July, August, September and October, 1911.

That it now operates, and for many years last past has operated sleeping cars over its entire system of railways, consisting of more than 7,000 miles of railway, in the States of Illinois, Wisconsin, Michigan, Minnesota, Iowa, Missouri, North Dakota and South Dakota, which said cars are constructed and divided into sleeping car units substantially the same as was the said sleeping car Waubeno, and that both the lower and upper berths of all said sleeping cars (About 145 cars in number) are used for the sleeping accommodation of passengers; that the use of the upper berths in the State of Wisconsin by travelers, both state and interstate, averages
10 about fifty per cent of the use of the lower berths; that is, the upper berths used are about one-half the number of lower berths used; and during the summer season, when travel is greater than during the remaining seasons, substantially all the upper berths are, as a rule, occupied with either state or interstate passengers;

that each one of its said sleeping cars, including said sleeping car Waubeno, is constructed and equipped with the best approved ventilating system in general use in the United States.

That compliance with said Chapter 272, Laws of 1911, would convenience the occupant of the particular lower berth only, and would not in any manner or to any extent benefit or convenience, or add to the comfort, or promote the health or safety of the occupants of the other berths of the car, either lower or upper; that compliance with said chapter would inconvenience and injuriously affect passengers occupying lower berths; that the defendant carries many thousands of passengers annually in its sleepers operated in Wisconsin, state and interstate, more than one-half of which passengers occupy lower berths, while at the same time the upper berths are occupied, without discomfort or sickness being caused thereby, other than the discomfort which necessarily inheres in the use of a sleeping car berth; that if such discomfort is to some extent lessened by raising the upper berth so that the occupant of the lower berth may have the use of the entire section, he may, under the rules and regulations of the defendant, procure the same by paying the lawful charge therefor, which in the instant case mentioned in the complaint herein was $1.20.

That sleeping cars constructed as are the sleeping cars of this defendant, as hereinbefore described, are operated in every state and territory of the United States, and have been for more than a quarter of a century last past; that none of the states or territories has by law or otherwise made it unlawful for the owners of
11 such sleeping cars to operate them with upper berths, nor has any state or territory by law or otherwise prohibited, in any manner, the use of such upper berths by passengers who desired to use the same.

That by an Act to Regulate Commerce, popularly known as the Interstate Commerce Act, approved Feb. 4, 1887, as amended June 18, 1910, sleeping cars engaged in interstate commerce are subject to the jurisdiction of that Act, and that the Interstate Commerce Commission appointed under that Act has full power to regulate the use and operation of such sleeping cars employed in interstate commerce, and to fix and prescribe the rate of charge for each unit of sleeping space, to-wit: the lower berth, the upper berth, the section, the compartment, and the drawing room; that said Commission after full hearing, long prior to August 17, 1911, made an order prescribing rates for each said sleeping car unit over certain prescribed routes, including routes through the State of Wisconsin, the rate fixed for the use of the upper berth being eighty per cent of the rate of charge fixed and prescribed for the use of the lower berth, and the rate for the use of the section being the sum of the rates for the lower and upper berths; that no order has been made by said Commission that in any way affects or prohibits the use of the upper berth while the lower berth is occupied.

That on said 17th day of August, 1911, and for several years prior thereto, defendant operated two sleeping car routes that were local to the State of Wisconsin, to-wit, between Milwaukee and La-

Crosse, Wisconsin and between Milwaukee and Star Lake, Wisconsin; that there were assigned to these routes two sleeping cars between Milwaukee and LaCrosse, one car leaving Milwaukee every night, and one leaving LaCrosse every night; and two sleeping cars between Milwaukee and Star Lake, one leaving Milwaukee every night, and one leaving Star Lake every night; that these cars made daily trips btween said cities; that they were hauled by, and were part of an interstate train, to-wit; a train which ran daily between
12 Chicago, Illinois, and Minneapolis, Minnesota, and Star Lake, Wis.; that said train, besides hauling a sleeping car between Milwaukee and LaCrosse, and Milwaukee and Star Lake, hauled one or more sleeping cars between said Chicago and Minneapolis, and a sleeping car between Chicago and Star Lake; that the aforesaid sleeping cars carried both state and interstate passengers, and furnished sleeping accommodations for each, and that such commingling of state and interstate passengers was necessary to the economical rendering of sleeping car service.

That in addition to the sleeping cars mentioned in the preceding paragraph this defendant operates other routes of sleeping cars between Chicago, St. Paul and Minneapolis, and between Chicago and points in Northern Michigan, and between Chicago and points in South Dakota, and between Chicago, Seattle and Tacoma in the State of Washington, all of which said routes extend through the State of Wisconsin, and all the sleeping cars assigned to said routes run through the State of Wisconsin; that all of said cars in said routes are engaged in interstate commerce, and in addition to carrying interstate passengers, carry passengers local to the State of Wisconsin, to-wit: between points in said State of Wisconsin; that each one of said cars is constructed and divided into sleeping car units substantially the same as is the said sleeping car Waubeno, and many of the upper berths in each of said cars are used and occupied at the same time the lower berths underneath the same are used and occupied; that the aforesaid sleeping cars carried both state and interstate passengers, and furnished sleeping accommodations for each, and that such commingling of state and interstate passengers was necessary to the economical rendering of sleeping car service.

Wherefore defendant demands judgment dismissing the complaint upon the ground that said Chapter 272, Laws of 1911, is invalid:
13 1st. It is arbitrary and unreasonable, and is not designed to accomplish a legitimate public purpose.

2nd. It gives to certain persons privileges and advantages which are denied to others, and is discriminating and class legislation, violative of the spirit of the Constitution of the State (Sections 9 and 13, Art. 1.), and is contrary to natural justice.

3rd. It denies to the defendant the equal protection of the laws, takes its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; and

4th. It regulates commerce among the several states in violation of Section 8, Article 1 of the Constitution of the United States, and

violates the provisions of the Act to Regulate Commerce, known as the Interstate Commerce Act.

BURTON HANSON,
C. H. VAN ALSTINE,
H. J. KILLILEA,
Att'ys for Defendant.

Bill of Exceptions.

The proceedings had and testimony taken at the trial are as follows:

Mr. JACKSON: I will offer in evidence the following allegation of the answer:

"And now comes the above named defendant, and for answer to the complaint of the plaintiff herein, says:

First. It admits that each and every allegation in said complaint is true, except the following allegation thereof:

'That thereby the defendant became indebted in the amount of $50.00 to the State of Wisconsin; whereby an action accrued according to the provisions of Section 1636*p* of the Wisconsin Statutes known as Chapter 272 of the Laws of 1911, an Act Relating to Sleeping Car Berths.'—

which said allegation this defendant denies."

14 And I now move to strike out all of the remaining allegations of the answer as irrelevant and immaterial.

COURT: For the purposes of the trial the motion may stand overruled.

Exception by the plaintiff.

State Rests.

Defense.

Mr. VAN ALSTINE: The defendant offers in evidence the stipulation made between counsel for the state and counsel for the defendant, marked Exhibit 1.

Mr. JACKSON: I object to the reception of any evidence on the part of the defense for the reason that the answer fails to state facts sufficient to constitute a defense.

COURT: For the purposes of the trial the objection stands overruled.

Exception by plaintiff.

EXHIBIT I.

It is hereby stipulated for the trial of this action that the allegations of the answer shall be taken as admitted with the exception of the following:

I. 'That compliance with said chapter 272, law of 1911, would convenience the occupant of the particular lower berth only, and would not in any manner or in any extent benefit or convenience,

or add to the comfort, or promote the health or safety of the occupants of the other berth of the car, either lower or upper; that compliance with said chapter would inconvenience and injuriously affect passengers occupying lower berths;'

contained in folio 12 of said answer:

II. 'Without discomfort or sickness being caused thereby, other than the discomfort which necessarily inheres in the use of a sleeping car berth;'

found in folio 13 of said answer;

III. 'That none of the states or territories has by law or otherwise made it unlawful for the owners of such sleeping cars to operate them with upper berths, nor has any state or territory by law or otherwise prohibited, in any manner, the use of such upper berths by passengers who desire to use the same.'

found in folio 14 of said answer.

It is understood that this stipulation shall not in any wise prejudice the right of the plaintiff to move to strike out any part of said answer as irrelevant or immaterial. Dated, May 9, 1912.

RUSSELL S. JACKSON,
Deputy Att'y Gen'l,
BURTON HANSON,
Plaintiff's Attorney.
C. H. VAN ALSTINE,
H. J. KILLILEA,
Defendant's Attorneys."

By consent of counsel for the respective parties the jury is waived.

F. W. GETTY being first duly sworn testified in behalf of the defendant as follows:

(Examined by Mr. VAN ALSTINE:)

Q. Mr. Getty, you are in the employment of the Chicago, Milwaukee & St. Paul Railway Company?

A. Yes sir.

Q. In what capacity?

A. Superintendent of sleeping cars.

Q. How long have you held that position?

A. About nineteen years and a half. Prior to that I was assistant superintendent for a year and a half.

Q. You may state whether or not you are familiar with sleeping cars in use by the defendant?

A. I am.

Q. Are you familiar with the method of ventilation employed?

A. I am.

Q. You may state in a general way what that is.

A. Well in a general way it consists of letting in of cold air through windows and doors when necessary, depending upon the

state of the weather, and it being taken out through the ventilation at the top, through what is known as the ventilators.

Q. You may state whether or not there is any provision for taking air in at the bottom other than by doors and windows.

A. Yes, by what is known as screens in the windows of the lower berths.

Mr. JACKSON: I suppose you include the deck lights as part of the windows?

A. I call them ventilators. The deck sash, yes, that is part of the ventilation, yes sir. The action of letting in the air through the windows, the screens and the doors, taken in connection with the deck sash, produces the ventilation in the ordinary acceptation of the term.

Q. Now, assuming that the lower berth of a sleeping car is occupied, and that the upper berth is closed, are you able to state whether that condition would convenience any other occupant of the car other than the one in the lower berth?

A. In my judgment it would not be of any benefit to anyone except the occupant of the lower berth where the upper berth is shoved up or closed—if I understand your question correctly.

Mr. JACKSON: I object to the competency of the witness in so far as his testimony relates to the benefit that it might confer. I think he ought to be confined to the facts.

The COURT: The answer may stand.

Exception by plaintiff.

Q. State if you can what effect if any that condition of things would have upon the circulation of air throughout the remainder of the car.

A. I should say practically none.

Q. You may state whether or not there is any objection to leaving the upper berth up when not in use, the lower berth being occupied.

17 Objected to as incompetent irrelevant and immaterial. Objection overruled. Exception by plaintiff.

A. You mean from the standpoint of ventilation?

Q. No, I don't mean from the standpoint of ventilation. I mean from the standpoint of inconvenience, if any, to the occupant of the lower berth.

Mr. JACKSON: I don't think I understand that question Mr. Van Alstine.

Q. Now assuming that the lower berths of a car are occupied, and that the upper berths are not when the car leaves, that afterwards passengers come in and take upper berths, now, assuming that the upper berths have been closed, and in order to accommodate the passengers last arriving must be lowered and made up; what objection is there if any, to that method?

Mr. JACKSON: I renew the objection.

Objection overruled. Exception by plaintiff.

A. The objection would be from the standpoint of convenience or annoyance to other passengers in making up that upper berth and getting it ready for the passenger. That would be one objection. There is more or less noise attending the letting down of that berth, which is always complained of in a sleeping car by exacting passengers. Whenever there is any unusual noise we hear from it in the shape of complaints. That is one objection. Another objection that would occur to me is, the disturbance of the occupant of the lower berth in making ready for the party who is to occupy the upper berth. In fact, if it were a lady passenger of somewhat timid nature or highly nervous temperament, the fact that the porter was there and opened those curtains more or less—must necessarily do that—would seem to me to be quite objectionable from that standpoint.

Q. Now you may state whether or not there is a method of locking those upper berths when they are down?

A. Yes sir.

Q. Now describe what that is and where the porter must necessarily put his hand in order to lock it.

18 A. Well, the adjustment of what is known as the safety cords would require the porter to fasten them in part of the lower berth before it would be safe to allow anyone to occupy that upper berth. These safety cords are to prevent the upper berth from closing up.

Q. And where are they fastened, to what part of the lower berth?

A. Well, it is right near the end of the berth, at each end of the berth.

Q. Both at the head and the feet of the passenger occupying the lower berth?

A. Yes.

Q. State whether it is fastened inside the curtain or outside the curtain?

A. Inside the curtain.

Q. Now you may tell us whether or not the upper berth can be closed after it has been completely made up for occupancy?

A. I don't think so. I don't know that we ever have occasion to try that in the course of our business, but the making up of the berth means that the sheeting and the blankets lap over in such shape that in my judgment it would be impossible to close up that upper berth and lock it.

Q. So that in any event something would have to be done to the upper berth to make it fit for occupancy when it is let down?

A. Yes sir. That is, if I understand you rightly, you mean that there would have to be some work done to prepare it for occupancy, no matter how much we tried to get the work done before it was let down. Is that the idea?

Q. Yes.

Q. To what extent is it necessary in making up the upper berth to displace the curtains in front of the lower berth? Assuming that the lower berth is occupied and the curtains are drawn, that the

upper berth has to be let down and made up for occupancy, to
19 what extent is it necessary to open the curtain in front of the lower berth?

A. Well, I think what I have stated in regard to the fact that you have got to do some work inside of those curtains practically covers it. Of course there is considerable work to it and the noise, etc., attendant upon making up that upper berth necessarily disturbs the passenger in the lower berth.

Q. Now, Mr. Getty, you said you had been assistant superintendent of the sleeping car service before you became superintendent. How long were you assistant superintendent?

A. About a year and a half.

Q. Now, during your connection with the company in the capacity which you have stated, can you tell us whether or not there has been any claim made by passengers that they were made sick or inconvenienced by reason of the upper berth being down?

Mr. JACKSON: Objected to as incompetent, irrelevant and immaterial, calling for hearsay testimony, transactions between third persons.

COURT: He may answer subject to the objection.

Exception by plaintiff.

A. I never have.

Q. In what states does the defendant operate sleeping cars?

Mr. JACKSON: That is admitted in the pleadings.

Q. Now, in any of the states where the defendant operates sleeping cars you may state whether or not there is any law requiring the upper berths to be closed while the lower berths are occupied and there are no passengers for the upper berths?

Mr. JACKSON: I object to that, the witness is incompetent to testify to it, and in the second place it is irrelevant and immaterial, calls for a conclusion of law.

COURT: Sustained until his source of knowledge is shown.

Exception by defendant.

Q. You may state whether or not you are familiar with
20 the method in which the defendant operates its sleeping cars in the states where it operates those cars and in all the states where it operates those cars?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception by plaintiff.

A. You ask if I am familiar with the custom or manner in which the cars are operated in the several states through which we run?

Q. Yes.

A. I am familiar with the custom and practice, yes sir.

Q. What I mean by that is as to the practice of the berths——

A. Yes sir.

Q. Now, you may state whether or not there is any law in any

of the states where the company operates sleeping cars that makes it unlawful to operate cars with upper berths?

Mr. JACKSON: I renew the objection.
Objection overruled. Exception by plaintiff.

A. No sir, there are no laws, sir, to my knowledge. I am generally advised as to the——

Q. You may state whether there is any law in any of those states where the defendant operates sleeping cars that prohibits the use of upper berths by passengers who desire to use them?

Same objection.
Objection overruled. Exception by plaintiff.

A. There are none, to my knowledge. We are operating them with the use of the upper berths.

Cross-examination by Mr. JACKSON:

Q. Are you familiar with the laws of New Hampshire, Mr. Getty?

A. No sir,—not any more than any ordinary layman would be perhaps, and that is practically nothing.

Mr. VAN ALSTINE: I didn't ask as to New Hampshire. We don't operate in New Hampshire.

21 Q. There may be laws in some of the states in which you operate as to which you have no knowledge, may there not?

A. There might be, yes sir, but not probable.

Q. Now, you have testified to the possible inconveniences that might result from the keeping closed of upper berths and the lowering of them and the making of them up after passengers in the lower berths have retired. Is it not a fact that many of the roads in this country voluntarily keep the upper berths closed during the night unless they are occupied?

A. No sir.

Q. Have you ever traveled between Minneapolis and St. Paul and Duluth?

A. I have.

Q. Isn't it a fact that those roads have been operating under that method for several years?

A. I couldn't answer that, because it was a daylight ride that I took.

Q. Well, isn't there a night ride there?

A. There is, but I don't recall ever having taken that night ride.

Q. If it be a fact that those roads running between those points have operated their cars in that manner for a year or more, what would that indicate to you as to whether or not such a practice meets with public approval?

Mr. VAN ALSTINE: That is objected to, because we don't know whether any complaints have been made.
Objection overruled. Exception by defendant.

A. Let me understand clearly what you are asking me.

(Question read.)

A. It wouldn't indicate anything to me along the lines of what the public approval might be, because I am not in position to know, nor have I made any investigation as to what the public think of it.

Q. Now, as the superintendent of a sleeping car system, would not that fact, if it be a fact, indicate to you that there are not
22 many serious complaints along the lines presupposed by the questions put to you?

A. No sir, it wouldn't indicate that to me.

Q. What would it indicate?

A. Well, that it might be an arbitrary ruling that was being carried out by somebody who thought that was a good idea, and they might be mistaken.

Q. Can you conceive of any such a ruling by railroads?

A. I can see no good reason from a business standpoint.

Q. Sleeping car companies usually try to make rules which will be popular with the public, do they not?

A. They should, and I presume they do.

Q. And wouldn't you draw the inference, as a superintendent, from that practice, that it was for the purpose of meeting public approval?

A. It might be a mistaken idea of some person who had the power to do that, but it would be a wrong idea from the standpoint of operating sleeping cars.

Q. Then it wouldn't convenience the sleeping car company at all.

A. Wouldn't inconvenience them?

Q. It wouldn't convenience them, it wouldn't be for the advantage of the sleeping car company to operate in that way, would it?

A. With the upper berths up?

Q. With the upper berths up when not occupied.

A. Convenience them?

Q. Yes.

A. No, I can't see that it would.

Q. It would be to the disadvantage of the car companies, if anything, would it not?

A. You mean from a revenue standpoint.

Q. The standpoint of convenience and revenue?

A. Well, that depends. You mean make no charge for pushing up the upper berth?

Q. Yes.

A. It would reduce the revenue, perhaps.

23 Q. I didn't get your answer.

A. It might reduce the revenue if they operated their cars and sold nothing but lower berths; it necessarily would I should think.

Q. Then from that fact you would not infer that a sleeping car company would voluntarily introduce the practice of keeping its upper berths closed—from the standpoint of the company?

A. I should say not.

Q. So that it would be for the convenience of the public if that practice were pursued, would it not?

A. As I said before, it might be a mistaken idea of some individual that had the right to order that done.

Q. Well, you say it would be to the disadvantage of the company to do it?

A. I said that it might reduce the revenue. I should think it would.

Q. Well, can you conceive of any reason that would lead a sleeping car company to voluntarily keep its upper berths closed when they were not occupied?

A. No, I can't say that I can conceive of any good, legitimate, business-like reason, no sir, not as it appears to me now. Somebody might be able to convince me otherwise.

Q. You are satisfied in your own mind that it would not be to the advantage of the sleeping car company to keep them closed, are you?

A. I don't see any advantage that they could derive from it.

Q. Do you see any serious detriment?

A. Yes.

Q. What is it?

A. Well, one thing that appears to me is, if you mean by closing the upper berth when it is not occupied, if that is the idea, why, you destroy any chance for the railroad company to check up the car.

Q. How would that destroy the chance for the railroad company to check up the car?

A. Well, when I say destroy, perhaps that is pretty strong.
24 I mean that it would increase the chances for dishonesty on the part of employes who were deputized to collect moneys.

Q. How so?

A. Well, if we had a checker on the car to report just what cash fares were paid, what berths were occupied, he would naturally take that section with the upper berths up, in his report he would report it as a section sold. Under your system, if I for example were to call in one of the conductors or porters who handles the company's funds, I would say to him "Here is section 7, you report as a lower berth only. The entire section to all intents and purposes was sold." He would answer, under the rules of the company, and as we understand it prescribed by law, "We had to shove that up, but we only sold the lower."

Q. You have a conductor on each car, have you not?

A. Most always, not always.

Q. You have a conductor on each train at least?

A. Well, we have a train conductor or a sleeping car conductor on every train.

Q. Who is supposed to check up the porter or the man in charge of the car?

A. The conductor himself is the man that handles the money of the sleeping car. Sometimes it is found necessary to check him up.

Q. Well, he is the only one to check up the porters. You fre-

quently obtain berths of the porters when the conductor is not there.

A. That's a rare occasion. You are not supposed to obtain berths from a porter unless there is no conductor.

Q. That's one objection. What is another?

A. Well, I think that I stated, from a revenue standpoint——

Q. Is that all you think of?

A. That's all I think of now. Well, there is another objection to operating a sleeping car in that way, from the standpoint of the railway earnings. If you only sell lower berths and no
25 upper berths, you have got twelve berths to sell, you have got twelve railroad transportations to sell. If you sell upper berths you get twenty-four. The earning capacity of that car is cut in two.

Q. Well, I think you have got an erroneous impression of the law. This law doesn't prohibit you from selling upper berths.

A. As I understood you, you asked me the objections to closing up these upper berths.

Q. When not occupied.

A. Yes, but as I understand you, between Duluth and Minneapolis the upper berths were closed.

Q. When they are not occupied.

A. I thought you meant all of them.

Mr. VAN ALSTINE: I thought you meant all of the berths closed.

Mr. JACKSON: All the upper berths not occupied were closed.

Q. Assuming that in the questions I put to you, would it change your answer in any respect to them?

A. Assuming what, sir?

Q. That the custom is to keep all uppers closed which are not occupied.

A. I wouldn't change any of my answers except those pertaining to railroad transportation. Of course if you didn't mean to keep all the upper berths closed, why then you could sell all the railroad transportation that your car would hold.

Q. So that you modify your answer in that respect?

A. To that extent, yes. I didn't understand your question.

Q. Now, I take it that the car Waubeno referred to in the pleadings here is ventilated in the same general manner as you have testified?

A. In the same general manner, yes sir.

Q. That is the system of ventilating?

A. Yes. There are so many different systems of ventila-
26 ting that perhaps if you want to go into it very deeply it would take someone——

Q. I want to know if this car is ventilated substantially as you have testified that cars are ventilated?

A. Substantially, yes.

Q. Now, you have testified that the raising of the upper berth would benefit only the occupant of the berth under it?

A. That is my opinion, yes sir.

Q. I will ask you this question: Assuming that all the lower berths in a sleeping car of the usual design were occupied, and that all of the upper berths were unoccupied, would it not affect the circulation of air in the car generally if all of the upper berths were closed?

A. Well, I think it would somewhat. Of course the curtains are all down. I can't say to what extent, however.

Q. But you will concede that it would affect it?

A. I think it would to some extent, yes. That is a scientific problem, I guess, that would have to be worked out by someone more expert in those matters than I am.

Q. Now, assuming the same conditions that I stated in my former question, and the further condition that the windows of the lower berths were open, would not the air have a much freer circulation if all of the upper berths were closed instead of lowered?

A. Well, I thought that I just answered that. I think to some extent. I couldn't say to what extent.

Q. Assume that all of the lower berths were occupied and that all of the upper berths were unoccupied, is it not a fact that the air of the car would be affected in proportion to the number of upper berths that were closed?

A. Rather a difficult question to answer. I would say that the curtains drawn as they are, that it wouldn't have very much effect.

Q. It wouldn't?

A. Not with the curtains down.

27 Q. Now, let us understand one another. The lower berth is supplied with air principally from the window?

A. From the windows and screens and doors.

Q. The main car window?

A. Principally from what?

Q. From the main side car window.

A. Well, hardly. I should say more air came in through the passageway and the end doors.

Q. And how does it get into the berth if the curtains are closed?

A. Well, I thought you meant the general outside of the berth. The air would come in from the passageway and the end doors.

Q. I say, the lower berth gets its air and ventilation principally from the window which has the screen to which you referred, does it not?

A. Yes sir.

Q. Especially when the curtains are drawn?

A. Yes.

Q. Where else does it get it from?

A. I say it gets it from there.

Q. Now, that air comes into that lower berth, and if the upper berth is closed it is confined to that space, is it not, to the lower berth?

A. I should say not. The curtains are nowadays made short enough to permit air to get in and out of that upper berth.

Q. Does not the usual curtain hang down below the bottom of the berth?

A. Below the bottom of the berth, but not to the floor, as it used to in olden days.

Q. So that some air can come down the aisle, down the center of the car, and up under the curtains?

A. Some can come from the aisle.

Q. But the greater portion of the air coming into the lower berth comes in through the window?

A. That is where I look for air in my berth, through the screen.

Q. Now, if the upper berth is closed, the air that comes in
28 through that window is confined to the lower berth, with the exception of such as may escape through the curtains, is it not?

A. Why, it is carried out in the aisle and up through the ventilators or the deck sash as we call them.

Q. Now, suppose the upper berth is closed instead of down, where would it go?

A. Go out in the car, up through the top and through the sides too.

Q. Now, when the upper berth is closed there is a chance for free access of air from the screen in the window up over the top of the curtain, is there not?

A. Yes.

Q. And there is also a chance for free access of air coming through the deck-light ventilator?

A. It doesn't come in there.

Q. Down through the lower berth?

A. As I understand the action of the air, when a train is moving, it doesn't come in there. It goes out there, but it doesn't come in there.

Q. It comes in part of the time and goes out part of the time?

A. I think not. Practically it goes out all the time.

Q. Then the object of having the deck light open is to draw the air up through?

A. Yes, let the bad air out, as I always understood.

Q. Then if the upper berth is lowered there is no chance for suction from the lower berth up to that ventilator, is there?

A. There is plenty of opportunity for the air to go out underneath the curtains and up through the same outlet.

Q. But the suction wouldn't be nearly so free as if the upper berth were closed?

A. Naturally one would conclude not.

Q. So that it would aid the circulation of air materially——

A. No, I wouldn't say materially.

Q. (continued). If the upper berth were closed, as between
29 the inlet in the window and the outlet in the deck light, would it not?

A. I wouldn't say materially. I would say some.

Q. How much would you expect?

A. Oh, I am not an expert on that. I couldn't say.

Q. Isn't it a fact that if the lower window were open and the upper ventilator were open and the upper berth were closed, that at least ninety per cent of the air coming in through the window would go directly upward to the ventilator?

A. I wouldn't undertake to say what per cent.

Q. What percentage?

A. I say I wouldn't undertake to say, because I couldn't tell you. I think that is a matter, perhaps, that would require more scientific investigation than I have ever given it. I don't think I could answer such a question.

Q. Well, you believe in your own judgment that a great deal of air would go up that way?

A. I believe some more would go that way than if the upper berth were down, but to what extent I couldn't say.

Q. Now, suppose that all of the lower berths on one side of the car were occupied and that none of the upper berths on the same side were occupied.

A. All on one side occupied and all on the other not—is that it?

Q. No, suppose, that all of the lower berths on one side of the car were occupied and the upper berths were not occupied?

A. On one side of the car?

Q. On one side of the car; and suppose the same condition on the other side of the car; would it not make a difference in the circulation?

A. With the berths pushed up?

Q. Whether the berths were pushed up or lowered?

A. Why, I think I answered that. I can't change it.

Q. What is your opinion—just state it.

30 A. Why, I think it would make a difference, certainly.

Q. If it would make a difference, then the occupants of the lower berths would get more fresh air to that extent, would they not?

A. If they were all closed up they would get a percentage perhaps.

Q. And the more upper berths that were closed the greater the percentage of air coming into the car and that would circulate generally through it?

A. Just what percentage I couldn't say.

Q. It would be greater, wouldn't it, in proportion to the number closed?

A. There might possibly be some difference, but not much, when your curtains are hung. Eliminate the curtains and I should say it would have more circulation.

Q. Assume that the lower berths are occupied and that the upper berths are unoccupied and raised up, is it not a fact that when the doors of the car are open the air coming in would have a much better access to penetrate the lower berths than it would have if they were closed?

A. Some. I wouldn't say to what extent. Naturally with all those upper berths up it would have a better chance to get to the lower berths.

Q. Have you ever occupied a lower berth when the upper berth was closed?

A. Yes sir, many a time.

Q. Is it not a fact that the air is much freer and fresher than when it is down?

A. I could-'t say that it was, no sir.

Q. You want to go on record on your oath as stating that?

A. I do, yes sir. I do for this reason, that if a car is properly ventilated and looked after in the way that it should. that your lower berths, with plenty of air coming in through those screens, gives you——

Q. Now, you are assuming that the screens are in there and that the windows are open?

31 A. Certainly. That is the way I have them.

Q. What is the fact with reference to winter traveling?

A. I couldn't tell you what proportion of people want a screen in a window of a lower berth during cold weather, but it is a greater proportion than most people imagine.

Q. Why do you think it is that they do want that opening in cold weather?

A. There can't be any question——

Q. It is very close in there when the windows are closed and the curtains drawn, isn't it, even in cold weather?

A. That depends a great deal upon how you ventilate your car. If you have a porter that doesn't look after his business, it is. If the porter and the conductor properly look after the ventilation of the car, it is not a pretty close proposition.

Q. Well, if the windows are closed and there is no screen in and the curtains are drawn and buttoned and the doors are closed——

A. Yes, but we reduce the temperature of that car down to 55 in winter; about that, 55 or 60.

Q. You think the reducing of the temperature makes any difference in the condition of the air?

A. No, not necessarily, but the air can get up under those curtains, now that they are made much shorter than they used to be.

Q. Well, when the windows of the lower berths are closed it would make a greater difference as to the condition of air in the lower berth if the upper were raised, would it not? When all of the windows are closed in winter time, as they sometimes are, it would make a still greater difference as to the condition of air in the lower berths if the upper berths were closed?

A. There would be some difference, as I stated, but I couldn't tell you how much difference.

Q. About what, Mr. Getty, is the cubic space confined by the lower berth, the upper berth when lowered, the curtains,

32 and the side of the car?

A. That is a question that I have never gone into.

Q. You can state the dimensions, can't you?

A. I can give you the dimensions of the berth.

Q. How long is the berth?

A. About 6 feet 2, 3 and 4 inches. The width is 3 foot, 3½, I think, something like that.

Q. And the space between is how much?

A. Well, that differs in different cars.

Q. Give us the average?

A. I will try and figure it. Pretty near 3 feet; somewhere around 3 feet.

Q. About 3 feet?

A. Somewhere there. I am not sure.

Q. Leaving out the fractions that would be 54 cubic feet?

A. Possibly. I never figured it.

Q. Do you know how much air the average individual requires?

A. I never figured on that even.

Q. Have you any idea?

A. Never thought of it.

Q. How many berths are there in the average sleeping car of the design of the Waubeno?

A. The average sleeping car would have twelve lowers and twelve uppers; that would be twenty-four; and three in the drawing-room, that would be twenty-seven. Some cars, although they are old fashioned cars, have some berths in the smoking-room for the use of the help.

Q. And they are made to accommodate two persons to a berth, are they not?

A. Well, you never see two people in an upper berth, very rarely.

Q. Well, you sell them that way—the rules of the company permit two persons to occupy a berth?

A. An upper berth?

Q. Any berth in the car.

A. No, not any berth in the car. There is one berth in
33 the drawing-room of the car—You mean the bulk of them?

Q. Yes.

A. Yes.

Q. So that you would have then as the capacity of the car 108 persons—is that right?

A. Whatever it figures. I haven't figured it. But unfortunately nowadays we only sell practically the lower berths; that is practically all we sell.

Q. I am not asking you that. I am asking you for the capacity of the car. You don't refuse to sell to the full capacity?

A. I don't sell them, but the company doesn't refuse.

Q. Well you are the superintendent, you know whether or not they will sell to a full capacity?

A. They are sold in the ticket office. One berth will hold two people, yes, if they crowd themselves.

Q. And you allow two people to occupy one berth?

A. Yes, two people to a berth.

Q. Now, will you give us the dimensions of the sleeping car of the designs of the Waubeno, the length, width and height?

A. The length is about 72 feet. I can't recall the exact width of it. We have a man here that has absolutely got all of that information and can give it to you accurately.

Q. Then I will not bother you. I didn't know that.

A. 15 feet something high and 72 feet long, but I would rather the other gentleman would give them.

Q. Now, you spoke of the possibility of annoyance to the occupant of the lower berth.

A. Yes, sir.

Q. Through the lowering and making up of the upper berth.

A. Yes, sir.

Q. Doesn't that same annoyance practically occur when the berth opposite, on the opposite side of the aisle is made up, whether it is a lower or an upper?

A. Well, I don't know that I quite understand. It doesn't
34 make any difference on which side of the car it is, the annoyance is just the same.

Q. From the making up of a berth?

A. Yes, whether it is the north or south side.

Q. It is nothing unusual for berths to be made up after people have retired?

A. Oh, yes, very unusual. We always carry a certain number of upper berths made up to take care of people en route. We don't make them up in the middle of the night but very seldom.

Q. It is not unusual to go into a sleeping car at 10 o'clock and find a half dozen berths occupied and the rest not yet made up?

A. It should be very unusual if the business is conducted properly, as we try to conduct it. There should be enough made up so that we won't annoy passengers, and those are the orders and the rules.

Q. It is optional with a passenger, the occupant of a seat, whether he will have his berth made up at 8 o'clock, 9 o'clock, 10 o'clock or 11 o'clock at night?

A. Not exactly, no.

Q. Isn't that the common practice?

A. No, it is not, no sir. We get through with making up our berths at a reasonable hour, so as not to disturb the other passengers. We have to make a ruling to take the best care of the greater number. We wouldn't uphold an arbitrary unreasonable passenger in demanding that his berth be made up at midnight after everybody has retired.

Q. Hasn't a person got the right to occupy his seat as long as he wishes, without having his berth made up?

A. We have got a right to make up that berth, I think, under all good business usages, at a reasonable hour of the night.

FRANK M. BOSTWICK, being first duly sworn, testified in behalf of the defendant as follows:

(Examined by Mr. VAN ALSTINE:)

Q. Where do you reside?

A. Chicago.

35 Q. And what is your business?

A. I am assistant general superintendent of the Pullman Company.

Q. How long have you held that position?

A. About seven years.

Q. What was your business prior to that time?

A. I was assistant superintendent at Philadelphia and at Cincinnati. I was chief clerk in the superintendent's office at Louisville, and I was conductor on the road.

Q. State whether or not you are familiar with the method of ventilation used by the Chicago, Milwaukee & St. Paul Railway Company.

A. Their ventilation is just about the same as the Pullman Company, and I am generally familiar with that.

Q. Now, what is the method of ventilation employed?

A. We use the Garland ventilator and the Milwaukee road uses the same, because we build a lot of their cars for them, a great many of them. The Garland ventilator is an exhaust ventilator on the roof of the car, that pulls the air out of the deck light. Now the deck sash is in the upper deck of the car, it is a small window that opens there, and the Garland ventilator is built to pull the air out. Now, at each end door there is a drop sash that lets the air enter, and except in cases of extreme weather the windows in the passageway along the aisle, the drawing-room and smoking-room, they are raised so as to let the air into the car and it is exhausted through the deck light.

Q. Now, at the top there are some windows ordinarily. What do you call those?

A. We call them deck lights.

Q. Now, the effect of those lights if they are open — state whether or not you know whether air comes in or goes out of them?

A. The air goes out. There is no air comes in there at all. It is a suction ventilator.

36 Q. Now, what is it that produces the suction in these ventilators?

A. The motion of the car.

Q. State whether the speed of the car has anything to do with the amount of ventilation in the car?

A Yes, it has an effect on it. The higher the speed of the train the greater the power of exhaust.

Q. Now, the ventilators you have on the roof, you speak of the Garland as being different or something else besides deck lights.

A. Yes sir. It is called the Garland because I believe it was invented by a man named Garland, and that is the designating name for it. It is on the outside of the car.

Q. And where does that take the air from, from what portion.

A. Right from the roof, inside. You know the car comes up and it has a narrow deck up at the top, considerably narrower than the width of the main portion of the car.

Q. You may state where that ventilator is placed with respect to the deck sash?

A. Directly opposite. The deck sash inside is right opposite the opening of the ventilator which is on the roof.

Q. Assuming that a lower berth is occupied and that the upper

berth is closed, you may state whether or not that would affect in any way the ventilation of the car as a car?

A. I don't think it would.

Q. Can you give your reasons why?

A. Well, the aisle of the car is free and open. The intake of the air is at either end of the car and at the sides by the hallway partition. The air comes in the ends, comes through the aisle of the car and out the deck sash, through the Garland ventilators.

Q. Now, when the curtains are closed and the upper berth is also closed, tell us whether or not there would be better ventilation in that particular section, provided all the other berths are oc-

37 cupied, upper and lower?

A. In the particular section that had the upper berth closed?

Q. Yes.

A. Well, the ventilation in that section, the window being raised the air would come in and pass right straight up out of the ventilator.

Q. Now, assuming that the window is not raised, would there be any difference?

A. I don't think there would be; not perceptible.

Q. There would, however, be more cubic feet of air in that section than though the upper berth was down?

A. Well, there is a greater space, a greater open space between the roof of the car and the bed.

Q. Now, are you sufficiently familiar with the ventilating to tell whether when the upper berth is closed and the lower berth is occupied and the window is open, where that air goes to that comes in through the window?

A. It goes right straight up and out the deck of the car.

Q. You think it doesn't go into the body of the car?

A. It wouldn't go down the aisle, because the tendency of the air is to go up all the time.

Q. In what states and territories does the Pullman Company operate cars?

A. In all the states and territories. I don't think there is an exception.

Q. While you have been connected with the Pullman Company state whether any claim has been made on account of the discomfort, or whether any claim has been made that sickness was caused by the keeping down of the upper berth?

Objected to as incompetent, irrelevant and immaterial and as hearsay.

Objection overruled. Exception by plaintiff.

A. I have never heard of such a case.

Q. You may state whether you have ever heard of any

38 law in any of the states or territories where the Pullman Company operates its cars which prohibits the use of upper berths?

Same objection.

Objection overruled. Exception by plaintiff.

A. I never heard of such a law in any state.

Q. State whether you ever heard of any law that prohibits the use of upper berths by passengers who desire to use them?

A. I never heard of any law that prohibits the use where a passenger desired them.

Q. Assuming that a lower berth is occupied and that the upper berth is closed, and that afterward a person comes and buys an upper berth, desires to use the upper berth, what inconvenience or discomfort, if any, is likely to follow to the occupant of the lower berth by letting down the upper berth and the making of it up?

A. The curtains of the berth have got to be thrown apart to pull down the berth, the porter has then got to release the safety cords, and he has got to practically enter that lower berth in order to lock them, as they lock down on the inside of the seat below the level of the mattress, pretty well down, one at each end of the berth. It entirely exposes the occupant of a lower berth. It doesn't make any difference whether it is a man, woman or child. There is no way of getting around that absolutely.

Cross-examination by Mr. JACKSON:

Q. You testified that the tendency of the air coming in through the windows is to go up?

A. Yes sir.

Q. Doesn't that depend upon the temperature of the air to a large extent, whether it is colder or warmer than the air in the car?

A. The inside of the car is generally warmer than the air on the outside of the car.

Q. The tendency of cold air is to go down?

A. It shoots right up. The exhaust at the top has a pull
39 all the time. If the car was standing still, then it would be just the same as an open window at the top in a room; there would just be the natural and the gradual rise. But when a car is moving, and you have got that force pulling the exhaust at the top, it is going to pull the air regardless of the temperature.

Q. Now, you have been in a sleeping car when it was running and when there was a direct draft coming down from the deck lights above you?

A. That used to be the case before we used the Garland ventilator.

Q. Then without the Garland ventilator it might occur?

A. It might.

Q. It has occurred?

A. It has occurred and used to be the case, and that is the reason we put in the Garland ventilator, to get away from the down draft that came in from the top. It is in universal use on Pullman cars, and I have no doubt but what it is in use on most of the Milwaukee cars.

Q. Do you know whether it is or not?

A. I know it is on some of their cars, but I don't know about its being on all of their cars.

Q. Do you know whether it was on the particular car in issue here, the Waubeno?

A. No, I don't know that car at all; I am not familiar with it.

Q. And I supose you have slept in lower berths, both when the upper berth was down and when it was closed?

A. Yes sir.

Q. Is it not a fact that the air is much better when the upper berth is closed ?

A. I wouldn't notice it. I never did notice it. I always sleep with a window open in the berth.

Q. Now, assume a cold night, when the windows are customarily closed, and the storm sash on, wouldn't it make some difference whether the upper berth were lowered or closed?

40 A. I never experienced that, but I don't think it would make very much difference. The berths are not air tight by any means.

Q. It is customary for people to keep the curtains closed, is it not?

A. O, yes, they keep them buttoned together. They are very loose. They come just below the bottom of the berth. They are open from there to the floor.

Q. But there is not enough air coming through there to satisfy you, you always want the window open?

A. I always do, just because when I am at home I always sleep with the window open.

Q. You do that because you want more air?

A. I want it on general principles, because I always sleep with an open window, summer and winter.

Q. Do you believe that the average lower berth, when the curtains are drawn and the upper berth is down and the windows are closed, affords sufficient air for the average person?

A. Yes sir, I do.

Q. But not for you?

A. Yes, for me, if I didn't prefer a window open, the same way that I do in my own room at home. I always want it open on general principles.

Q. You agree substantially with the dimensions of a berth given by Mr. Getty, do you?

A. Why, the dimensions are about 6 feet 2, 3 feet 6 wide, and about 42 inches high. That is about the general proportion.

Q. That is about 55 or 56 cubic feet of air?

A. Well, you can figure it up. I don't know.

Q. Do you know how much air the average individual requires?

A. No, I do not.

Q. Suppose it were 800 feet, what would be your opinion?

A. 800 feet for what?

Q. 800 cubic feet per hour.

A. That is what I want to get at.

41 Q. What would be your opinion as to whether or not the average lower berth under the conditions I have just stated furnishes sufficient air?

A. That wouldn't alter my opinion on it at all, because the air in a berth is changed sufficiently to meet that condition by the general ventilation of the car.

Q. Now, it is frequently the case, is it not, that the deck lights are closed in cold weather?

A. Not all of them, never. Oh, you may get a hold of a bull-headed porter who would close them up, but it would be against the rules.

Q. During the months of December, January and February, in inclement weather, it is quite usual to have every third or fourth deck light open and the rest closed?

A. They are all open just a little ways, some more. It depends on the weather outside.

Q. But they are closed more in cold weather?

A. They are not as wide open in cold weather as they are in warm weather.

Q. And you put on storm sash in the winter?

A. There is some used up in the exereme north, but 90 per cent of the cars don't have storm sash.

Q. Don't the Wisconsin cars use storm sash cars going through Wisconsin?

A. Ours don't.

Q. Don't the St. Paul?

A. I don't know what the St. Paul does. I don't believe they do.

Q. You say you don't have storm sash on your cars going through Wisconsin?

A. Not unless some of those running over the Northern Pacific road to Seattle.

Q. Do your cars run over the North Western?

A. Yes.

Q. Over the Omaha division?

A. Yes.

Q. Run between Chicago and Superior and Duluth?

A. Yes.

Q. And you want to go on record here as saying that they
42 don't have storm sash?

A. Some of them may, but we have gotten away a good deal from that, we don't use that to the extent we used to use it. We have a better heating system on our cars and we don't have to use our storm sash as much as we used to. We have made improvements to our cars very extensively in the last few years—well, we are making them all the time.

Q. Now, assume, Mr. Bostwick, that all of the lower berths in a sleeping car of the ordinary design are occupied, and that all of the upper berths are unoccupied, would it not affect the circulation of air in the car generally if all of the upper berths were closed?

A. I don't think it would affect the circulation of the air generally any different. The air from each particular section would go right up to the roof and go out. Each section has four sides, has its own cubic space, and the air would go out.

Q. Assuming in addition to the facts assumed in the former question the further condition, that the windows of the lower berths were open; would not the air have a much freer circulation if all of the upper berths were closed instead of lowered?

A. That would be a different circulation. The air would come in the window and go right up and be pulled out.

Q. Well, that would be a considerable amount if the car were going fast?

A. Yes.

Q. The faster the car is going the more the circulation of air?

A. The faster the car is going the greater pulling power the exhaust ventilator has.

Q. So that it might make a material difference as to the condition of the air in a car whether the upper berths were closed or open, might it not?

A. In each particular section only. It wouldn't make any difference to any other section. Each section would have its
43 own control. But all the sections are alike there, under your case, all the sections are alike; every lower is made up, every upper is closed, conditions are exactly the same in every section.

Q. Then is it not a fact that the air of the car would be affected in proportion to the number of upper berths that were closed?

A. Well, when you speak of the car, you single out the sections, and then you speak of the car as a whole.

Q. You have got the condition of the lower berths being occupied.

A. And all the uppers closed.

Q. All the uppers closed. You have that condition.

A. I answered that.

Q. Then you answered the question with the further fact that the windows of the lower berths are open.

A. Yes, I answered that.

Q. Now, I ask you if it is not a fact that the air in the car is affected directly in proportion to the number of the uppers that are closed, under the conditions assumed?

Mr. VAN ALSTINE: I don't think that is quite a proper question, if the court please. Now he has all the sections on both sides closed, the upper berths. When he speaks of the car, there is nothing remains but the aisles.

Q. Can you answer that question?

We will deal with the berths, that is your idea?

COURT: He may answer.

A. Let me understand correctly, Mr. Jackson. You say a majority of the upper berths closed and a few of the upper berths down?

Q. No, all the lower berths are occupied. I am asking you whether with the windows of those berths open the air of the car is not affected in proportion to the number of upper berths that are closed?

A. Only so far as the particular sections are concerned that have the upper berths closed. The upper berths closed on one entire side of the car, and the upper berths down on the other side
44 of the car, I don't think that the circulation of air on the side that is open has anything to do with the circulation of air

in the lower berths on the opposite side of the car where the berths are down.

Q. Now, you don't want to be understood as testifying that all of the air that comes in through the windows in the lowers goes out through the Garland ventilator?

A. Well, there is a particle of it may not, but a good portion that comes in behind the curtain and goes right up.

Q. Well, now, Mr. Bostwick, when a car is going at the rate of from 30 to 50 miles an hour, as cars frequently do, isn't it a fact that the air that comes in through a window is in considerable proportion disseminated out through that car?

A. It blows in and finds its way up through the ventilator.

Q. That ventilator is for the purpose of drawing the bad air of the car out?

A. That's it exactly.

Q. So that when the new air gets in it mixes up with the air that is in the car and forces it up?

A. The bad air naturally rises with the air that comes in.

Q. Isn't it a fact that when a window in a sleeping car is wide open and the curtains are wide open, the air permeates wherever it has access?

A. It would circulate more or less.

Q. Isn't it a fact also that when the upper berth is lowered and the window is wide open, the window of the lower berth, and the curtains are draw, that not so much air can come into the car as would come in if the upper berths were raised?

A. Well, that air——

Q. Isn't that a fact?

A. I will answer the question. The air that enters an open window in a berth, the curtains are drawn, the upper berth is down, when the air comes in that window it will circulate around and go out the same window. You know that, don't you?

Mr. JACKSON: I submit, your honor, that the question is a fair question.

(Question read.)

A. Well, the air that comes in——

Mr. JACKSON: I submit the question calls for a yes or no answer.

A. The air that comes into the window might force some of itself out through the curtains, but the tendency of it would be to go up.

Q. So that if the upper berth were lowered it would prevent that air from going up?

A. If the upper berth were lowered some of that air would go out into the body of the car, which is an advantage in having the upper berth down.

Q. It is also a fact that when the upper berth is closed air comes over the curtain and comes down, is it not?

A. Oh, no, I don't think so at all.

Q. Do you testify that riding on cars you have never felt drafts from above down?

A. I said that under the system of ventilation that we formerly had, where the air was taken in at the deck, then it came down; but now the air is taken out of the deck, there is no air comes in at the deck lights at all. We have guarded against that. We had to do it to avoid the drafts in cars.

Q. How long has the Garland ventilator been in use?

A. We started to put it on about six or seven years ago; about six years ago; probably a little over six years ago.

Q. Now, you stated that in order to make up the upper berths when a lower is occupied you had to separate the curtains and fasten the safety cords?

A. Yes sir.

Q. Well, it is a fact that those safety cords can be fastened from the ends of the curtains instead of from the middle, isn't it?

46 A. Oh you can push the curtain away, but you have got to push them away and the porter has got to reach down inside of the berth to do it. We have some cars with curtains that wouldn't permit that. A great many of our cars have a curtain where the opening is right at the head-board, that is the division point between the berths. We have others where we have one curtain that reaches from the center of one section to the center of the other, no opening at the head-board at all. A car fitted that way, the curtain would have to be pushed aside and the porter enter the berth from the center to fasten the safety cords.

Q. Well, the difficulty suggested can be very easily remedied by having those curtains open at the ends?

A. We could cut them there, but we wouldn't do it. We have the curtains that way for the express purpose of protecting the passenger, making the occupant of the berth more secure; instead of having an opening at the center and an opening at the head of the berth, we make only one opening and that at the center of the berth.

Q. The porter doesn't have to get his hands in and shake you to wake you up?

A. The porter has instructions not to put his hand in any berth to awaken any passenger.

Q. They don't often obey those instructions then?

A. Well, I think they do. I would fire a man in a minute if he put his hand in a berth to wake up a passenger, if I knew it.

Q. Is it not a fact that some companies have adopted the practice of keeping the upper berths closed unless they are occupied?

A. Voluntarily?

Q. Yes.

A. I believe so. I understand so.

Q. Then so far as you know that has met with general satisfaction?

A. I don't know anything about it. I presume a passenger will take all he can get for nothing.

47 Q. And you think the objection to that practice would be that the passenger was getting something that he isn't entitled to?

A. He is getting something he don't pay for.

Q. That is the principal objection that you know of?
A. There is the same objection that would follow in general to allowing the upper berths to be up and then having to make them up during the night for some other person.
Q. Are you the gentleman to give us the dimensions of the car?
A. No. I can give you some dimensions.

Redirect examination by Mr. VAN ALSTINE:

Q. Now, tell us if you can about the movement of curtains by the running of the train?
A. The movement of curtains?
Q. Yes, as to whether or not they sway out from the berths.
A. Oh, yes, they will sway back and forth as the car rocks, of course. They are suspended from a rod and they will sway to some extent.
Q. To what extent will they sway out?
A. Well, it depends on to what extent the top of the car rocks. Maybe five or six inches or more.
Q. That would all aid in the circulation of air?
A. Oh, naturally.
Q. Tell us, if you can, whether a lower berth could be made up ready for occupancy and then closed up?
A. You mean an upper?
Q. The upper berth I should say.
A. Oh, yes, it could be made up, but in closing it up it would have to be disarranged. It couldn't be made up and closed up and then let down without rearranging it. The bedding would have to be shoved back to the back of the berth and the pillows would have to be thrown in the back; it would have to be rearranged after it was let down. The sheets and blankets could be spread before it was closed up.

Recross-examination by Mr. JACKSON:

48 Q. It could be made up substantially, so that but little would be necessary after it were lowered?
A. It would have to be entirely made. The sheet and blanket could be spread. It comes forward pretty well to the edge of the berth and the bedding would have to be shoved back and the pillows would have to be shoved back in the berth. Then it would have to be straightened up a little and the pillows arranged in the proper position.

J. A. M. DEVOY being first duly sworn testified in behalf of the defendant as follows:

(Examined by Mr. VAN ALSTINE:)

Q. Mr. Devoy, where do you live?
A. Milwaukee.
Q. What is your business?

A. At present I am assistant superintendent of motive power of the Chicago, Milwaukee & St. Paul Railroad.

Q. How long have you held that position?

A. Two years and a month or two.

Q. How long have you been employed by the company.

A. Nearly twelve years.

Q. In what capacities were you employed before you became assistant superintendent of motive power.

A. Mechanical engineer.

Q. As such engineer did you have anything to do with the manufacture of sleeping cars?

A. I have been one of a committee of three which passes on all cars, including sleeping cars, in their design and manufacture. We don't build any sleeping cars. They are built by the Pullman Company, Barney & Smith, and others.

Q. Are you familiar with the ventilating system that is used in the Chicago, Milwaukee & St. Paul sleeping cars?

A. I am.

Q. You may state what that is.

A. As a general proposition the ventilating system of the
49 Milwaukee road was the open type of ventilator up to, say, four or five years ago, when we began to use the Garland, the Bogart, the Agram, I think about eight or ten different types, testing them out as to their efficiency. At the present time I should say probably we have a hundred cars with Garland ventilators, although I haven't that information with me.

Q. Now, you may describe how the Garland ventilator causes the air to circulate.

A. The Garland ventilator is known as an eduction ventilator, or, in other words, it attempts to draw the air from the car to the outside, using its motive power, the speed of the train or the velocity of the wind, to create what might more properly be termed a suction. It is a series of conical tin plates or circular tin plates, deflecting the wind or the air outwardly, causing the suction.

Q. Now, where does the air enter the car?

A. I think it would be entirely proper to say that the air would enter the car at any place there was an opening, preferably through the windows, if they were open, or the end door or the end sash if it were lowered—any place that there would be an opening in the lower part of the car; and it will also enter in the clear story or the upper part. That is, it will enter in the clear story in some constructions. That was the one reason why we discarded different ventilators, because they would allow air to enter in the clear story—the clear story being that part of the car above the berths—or shooting the air crosswise.

Q. That system, I understand you to say, is being discarded?

A. Looking at the records I have this morning, the ventilators I tested, I found that we had thrown out eight different ventilators; some because a side wind would operate the ventilators in one side of the car and would draw the air from the opposite ventilator, causing a draft or a dropping in of cinders and dirt, particularly in the

dining cars, onto the tables in the dining cars. Some others
50 caused a draft on the heads of passengers, which is very objectionable, and were discarded because of that. I have a list of several of them if you care to have it.

Q. Now, then, the one that is in general use on the defendant's line is what?

A. I should say that the one that was in general use was the open type of ventilator, consisting of a wire screen, a window which drops over on an angle of—well, 45 degrees, making a clear opening; I think we would find more of those; and with deflector plates on the inside, between the screen which is on the outside of the car and the sash which is on the interior of the car. I should say there were more of that type than any.

Q. More of that type than the Garland?

A. Yes, sir.

Q. How many did I understand you to say they had equipped with the Garland?

A. I have merely given an estimate of a hundred cars. I don't know how many we have.

Q. How many sleeping cars have you?

A. That have Garland ventilators?

Q. No, how many sleeping cars have you?

A. I don't know that. I have given the total. That includes dining cars and everything. Nearly all of our dining cars would have a Garland ventilator on the kitchen end.

Q. We are talking about sleeping cars. In giving the hundred cars, do you mean we have a hundred sleeping cars equipped with Garland ventilators?

A. No, I mean the total; all kinds. I want that to stand as an approximate figure. I don't know just how many we have.

Mr. JACKSON: Did you give your estimates as to the total number of sleeping cars that you have?

A. I can get it for you in a few minutes if you will allow me.

Mr. VAN ALSTINE: It is admitted in the pleadings as 145.

Q. Now, assuming, Mr. Devoy, that the lower berth in a
51 sleeping car is occupied and that the upper berth is closed, that afterwards the upper berth is sold and has to be made up for a passenger to use, tell us if you can what effect the leaving up of that upper berth would have on the circulation of the air in the car?

A. It would have the exact proportion that the opening under the curtains would be to the total space in the car, or, in my opinion, it might have two per cent. to do with the circulation under certain conditions. Those conditions would be that in the winter time, where the lower windows were closed and storm sash on, giving no opportunity for an opening in the window of the lower berth, it would only vary as to the amount of air that would pass under the curtains from the floor line, say. I don't believe that that would be above two per cent. If in the summer time the forward and rear window were open and a deflector placed on the forward window, assuming the car running ahead, it might tend to draw outward;

in other words it might draw the circulation down; as you have often seen cinders on your berth, very often I have seen that, and it has been one of the things we have tried to overcome. So that it would be between two per cent. of the total going out, and it might reverse, two per cent. the other way. It would depend on which way the currents were.

Q. Now, you may state whether or not the leaving up of the upper berth would be a convenience or a benefit to any passenger in the car other than that passenger in the lower berth?

A. In the summer time I would say that the majority of people or some of the people might prefer the berth being up. In the winter time I would rather say that they would prefer the upper berth down. That on account of the general proportions of people that I have heard have always made objections to the draft hitting them—so that benefits which might be derived by ventilation in the summer time would be harmful in the winter time.

52 Q. Now, assuming that the upper berth is closed and the curtains are drawn and the lower berth occupied and that air comes in through an open window in that berth, tell us where that air goes to?

A. I should say the greater part of it would pass out through the top, that is, through the openings in the curtains and the car windows which is on the roof, although some of it would pass out, blowing the curtains outward, would pass out through the curtains. And, as I stated in my first explanation to you, it might, if the deflectors were placed right, might turn that around and pass out the rear window. The deflector is a small wooden board placed on the outside of the window.

Q. Now, assuming that the lower berth is occupied and the upper berth closed, what benefit will that be or give to a passenger in some other part of the car, if any?

A. I wouldn't say that it would give any benefit. I don't think it would change the opening in the side of the berth adjacent to the curtain. So that I can't see just how it would help him. I would rather say that if the ventilators in the top of the car were operating properly that it would clear the car more quickly than it would if the berths were up, the upper berths, I don't think that would have much to do with clearing the car.

Q. That is, what you mean is that if the upper berth were closed it might carry the air through the car quicker—is that it?

A. No, I didn't mean that. I understood your question to mean that the upper berth was closed, what effect would that have upon the rest of the car, is that it?

Q. Yes, what benefit would that be to some other passenger in the car, other than the one in the lower berth?

A. I don't think it would be very much benefit.

Q. Now, assuming that the lower berth is occupied and the upper berth is closed and that berth is subsequently sold and has to be made up, what inconvenience, if any, is that to the passenger in the lower berth by the taking down and making up of that upper berth?

53 A. In my answer now I speak only of design, I never have made up a berth in my life, but the operation is that there were two safety chains which are wound together by a string, sometimes they are of steel wire rope, and I have seen them of a number of different materials. When the berth is pulled down they are locked, preventing the same thing that would happen to a collapsible bed or a safety bed, prevents them from going up. Then a curtain pole is pulled outward and over the top of the berth. In a great many cars it would necessitate the pushing back of that curtain pole and is an absolute impossibility to put up the upper berth tightly. In modern cars the curtain pole can be used whether the upper berth is up or down. But that would be the objection, it would be the pulling out and fastening of that mechanism and the making up of the berth, whatever that would be.

Q. Now, where would the porter have to put his hands with respect to the lower berth in order to lock the upper berth after it was down?

A. He would have to put his hand inside the curtain, he would have to pull that down and put it on the inside of the curtain.

Q. Now, you may tell us whether the speed of the car has anything to do with the movement of air passing through the car, circulating through the car?

A. It has all to do with it. The movement of air taken from the car is in direct proportion to the speed of the train, almost in direct proportion to it.

Cross-examination by Mr. JACKSON:

Q. As I understand from your statement, Mr. Devoy, your company has about one hundred cars fitted with the Garland ventilator?

A. I don't know how many are equipped. In other words, we got 150 cars from the pullman people a year ago; there was a controversy over the number that were to be equipped with Garland ventilators. Now, if we had 75 or 125, it might be a possibility. I don't want to say how many. I would rather leave that out.

54 I know we have a number of cars equipped with Garland ventilators.

Q. According to your estimate I infer that about one-third of the cars of the company are fitted with Garland ventilators—is that correct?

A. I can get it for you in an hour by wiring. I don't know now, and I don't want to say. I know there isn't an old car on the system that has an open ventilator.

Q. You say that some seven or eight different ventilators were discarded for the reason that they did not prove satisfactory?

A. I have a record of eight in my pocket.

Q. They caused either down draft or brought in cinders or had some other objectionable feature, they didn't serve the purpose of ventilators properly?

A. That's it.

Q. And I infer from that it is rather difficult to get a perfect ventilator for a car?

A. It has been one of the hardest things I have ever seen in my experience, to properly heat and ventilate a car.

Q. Now, isn't it your opinion, Mr. Devoy, that the raising and closing of the upper berth materially improves the air for the occupant of the lower berth?

A. May I refer to my answer about the two per cent. I want to say just the same thing I did then. I told you about two per cent, I should say, and then explained how it went in different methods. If you will read that answer, I want to stand on that.

(Previous answer of witness read.)

Q. Now, assume that the curtains are closed and the upper berth is down; it would surely affect the air of the lower berth materially to open the window, would it not?

A. It affect- it, yes.

Q. To a considerable percentage, depending upon the extent to which the window was open and the speed with which the car was going?

55 A. Oh, yes, I have seen it all blow in the window, all the available window—usually for the reason that there was no deflector put on. If you leave off the deflector, I would say that a great deal would blow in.

Q. Now, assume these conditions: that the lower berth is occoupied and that the window is open, the upper berth is closed; according to your testimony, as I understand it, the fact that the upper berth is closed would not make any very great difference as to the air of the car generally—am I right?

A. That's just what I want to say. The tests I have seen show that an ejector or any eduction principle can be worked only to a certain limit, and I want you to know that in my opinion you couldn't get one bit more air inside of that window than the ventilators would take care of, and the question of whether the upper berths were up or down would not materially affect the intake and the outlet. The circulation of air in the case you speak about would be entirely proportionate with the openings of the window and the openings and efficiency of the ventilator.

Q. Now, when the upper berth under those conditions is closed and the ventilator is in operation, there is a direct draft coming in from the window and going up to the top of the car, is there not?

A. That is what I tried to explain.

Q. And the velocity of that draft would depend in great degree upon the speed of the car—is not that the fact?

A. That is true.

Q. Now, in proportion to the velocity of that draft would not the air in the car generally be drawn into the vortex, so to speak, and drawn up and out?

A. Where is the vortex of a car? I don't understand you now.

Q. Well, when the car is running, the side window is open and the ventilator is working, the air rushes in the window, does it not?

A. Yes.

56 Q. And when it comes through the window and meets the conditions in the air it whirls as it goes upwards?

A. I wouldn't say that it whirled.

Q. Well, it at least goes upwards?

A. Yes, the wind goes upward. I have seen it go downward. It is one of the things that we have had to try to overcome.

Q. So that when the air comes in through the window and goes up, it may not go up through the ventilator, it may go over the top of the curtain and drop?

A. I don't think that it would drop much if it went up as you have just explained. I mean to say to you now that it might blow in and hit your lap, which might be six inches below the window, I wouldn't want to say what the direction of the current would be, but I don't think it would come right in and shoot right up and go out just as fast as it would come in.

Q. But a certain percentage of it would be disseminated?

A. It certainly would.

Q. Going back to the conditions: the windows open and the lower berth occupied, the upper berth is closed, there is a suction, the velocity of which depends upon principally the rapidity with which the car is going; does not the fact of that air going up there draw towards it other air in the immediate vicinity?

A. Other air from where?

Q. From different parts of the car.

A. Other than that coming in the side?

Q. Certainly.

A. No, I don't think so.

Q. Can you have a draft between that door (large door of court room) and this door (side door of court room) without affecting the air where I am standing?

A. Where do you mean, the air coming from where?

Q. Assume that that outer door is open and that this door is open and that there is a current of air passing from that door through this door at such a velocity as the air would come through the
57 car when a car was running at an average speed; would not the current of air passing through there affect the air where I am standing?

A. It certainly would.

Q. Then wouldn't it affect the air around on the outside of the particular berth?

A. Certainly would.

Q. And would not the air of the car be affected in proportion to the number of the upper berths which were closed, assuming that all of the lower berths were occupied and all of the windows open?

A. I want you to understand that in my opinion, now in my opinion the fact as to whether the upper berth was up or down would not materially affect the question of the circulation of air in the car. Does that answer your question?

Q. No. I will put this to you: Assuming that all of the lower berths of the car are occupied and that all of the upper berths are unoccupied, would it not affect the circulation of air in the car generally if all of the upper berths were closed?

A. I told you I didn't think it would materially. Perhaps two per cent I said.

Q. Your testimony was confined to a particular case, wasn't it?

A. Perhaps two per cent of the total opening of the car. It would affect the car just whatever the deflection of the air——

Q. You mean——

A. That's what I mean, yes.

Q. Do you mean to be understood, Mr. Devoy, that if all of the windows of the car were open and all of the upper berths were raised, that the condition of the air of the car would be affected only two per cent over what it would be if those windows were closed and the upper berths were lowered?

A. Yes, I so say that. May I explain that to you in another way.

58 At a test at the Master Car Builders' Convention, personally conducted by Mr. Garland, that was his claim, that the amount of air from the windows which was greater in area than his ventilator did not cause the drafts that you speak of and a straight shot to the top of the car, but did circulate the air at and about the lower berth, removing the foul air from all parts of the car; and that is one of his principal claims, that he tried to determine, and the pneumometers or air current measuring machines which he had in service there determined that that was a fact. He even claimed—I didn't believe this—he claimed that it would remove air from this corner (indicating corner under judge's bench); I didn't believe it would, because there wasn't a chance to draw it out.

Q. You didn't agree with Mr. Bostwick, that there is considerable draft——

A. To a certain extent I agree, and I have tried to explain that. I tried to figure it up in my mind when I sat down there, so that I could answer you; probably two per cent of the total, and I can't change it and tell you what I believe.

Q. Assume that none of the berths are occupied and they are all closed and all the windows are open, what effect would that have upon the circulation of air in the car?

A. I don't believe it would have very much.

Q. You don't?

A. No, I don't.

Q. How long would it take to completely change, that is, change to one hundred per cent, the air of the car, with all the windows open, running at 30 to 40 miles an hour?

A. Two and a half minutes.

Q. Then you would have a change of a hundred per cent in two and a half minutes, wouldn't you?

A. From the tests which I saw, and checked up by the tests which I have personally made, at a speed of 35 miles an hour. May I quote from my own record here in my pocket?

59 COURT: If you want to refresh your recollection, you may do so.

A. (After referring to paper.) I will say now that at a speed of

36 miles an hour, equipped with a Garland ventilator, that a car will completely change its air in two and one-half minutes.

Q. Now, what effect would the making up and the lowering of the lower berths and the hanging of the curtains, in your judgment, have upon those conditions?

A. At a speed up to——

Q. Same speed, 36 miles.

A. It wouldn't have very much difference. I am going to try and give it to you in a different way.

Q. So that you could still, with the lower berths lowered and the curtains hung, change the air of the car by having the windows open in two and a half minutes?

A. Absolutely. That is just what I mean.

Q. Then what effect would it have to lower the upper berths?

A. I don't think that at 36 miles an hour it would empty the car one fraction of a second difference. I don't believe that the baffling of the wind would make any difference. I don't believe if you put partitions every five feet along in the car, and still would distribute your ventilators as they should be at different points in the car, that you could vary it by all the baffling five per cent. I don't think that would be possible. I do think it would be possible that some of the air in the remote corners would not be removed as rapidly as it would if it were in the direct line of circulation, although that is claimed by several men who own patents on ventilators.

Q. There is a dispute on that then, there is some difference of opinion?

A. Oh, there has always been a difference of opinion. Every man who owns a patent ventilator is crazy on that subject.

Q. Have you the car dimensions, Mr. Devoy?

A. Well, I have some dimensions in my pocket of berths, that's all, with reference to cubic capacity.

60 Q. Those are for the average car, are they?

A. Yes sir.

Q. Will you give them to me?

A. The average sleeping car has about 4,500 to 5,000 cubic feet capacity.

Q. And the capacity of the average car is as testified to by one of the former witnesses? You heard the testimony—I won't bother to repeat it.

A. For a berth, you are referring to?

Q. Yes, number of berths and number of people.

A. A lower berth will average from 50 to 62 cubic feet. Now, that variation would depend on where you take your—if you are considering the upper berth, it would depend on where you take that line from, that is all.

Q. Now, assume that all of the lower berths are occupied and all of the upper berths are lowered and the curtains are dropped and drawn, how rapidly in your opinion would that air be renovated, renewed, assuming a car running at 36 miles an hour?

A. Two and a half minutes at 36 miles an hour is what my tes-

timony is. Is that what you want now? Maybe I don't understand you.

Q. No, assume that the lower is occupied and that the upper berth is lowered, that the car window is closed, and that the curtains are drawn; under ordinary conditions how long would it take for that cubic space of air to be renovated?

A. From the tests which I have either witnessed or personally had a hand in conducting or in some way seen, it is shown that a car at 36 miles an hour will eject about 5,000 cubic feet of air in two and a half minutes, or about the cubic capacity of a car, a sleeping car.

Q. That is when all the berths are closed, according to your former testimony. Now, I am stating different conditions.

A. Do you understand me then when I say that in my opinion a ventilator is rated entirely by its capacity as an ejector or as
61 an eduction motor, if you want to, and that the amount of air which can be ejected or drawn through that ventilator is entirely proportionate with the speed of the car.

Q. I understand that, Mr. Devoy. And I presume the amount of air that you could eject would depend upon the amount coming into the car to a large extent. If the door was open most of the air ejected would be air that came through the door. Now, I am asking you——

A. I don't want to get it that way at all. Let me answer it, if you please. You said that it had altogether to do with the air coming in through the door. That would govern it to some extent, but it is entirely governed, almost entirely governed, by the action of the air on the outside of the car. I can explain it to you with a piece of paper in a minute, if you don't understand it.

Q. I think I perfectly understand——

A. The inside hasn't very much to do with it.

Q. It takes two and a half minutes to empty the car and all the current——

A. Wait a minute, I don't want it that way. I want to change that. I said the inside doesn't have very much to do with it. I want to put it this way: The inside don't have very much to do with it, providing the area of the intake is slightly over the area of the ventilators—just about.

Q. Now, this is true, isn't it, Mr. Devoy, that if all of the windows of the car are closed and all of the upper berths are lowered and all of the curtains are drawn and there is a rear window open, that the greater part of the air which is ejected——

A. There wouldn't be any ejected if it were in the condition you say now. It would create a vacuum there to the extent of the power of the ventilators, providing all about them was tight.

Q. Is that condition frequently found?

A. No, I never saw a tight car in my life.

Q. Now, the fact I want to get out of you is this—at least
62 the opinion I want to get out of you is this: You say you have got 52 cubic feet of air, between 52 and 55; now, assume that the window is closed, that the curtains are drawn, and that the upper berth is lowered, and the car is running at the rate of 36 miles;

how frequently in minutes will the 52 feet of air be removed and replaced?

A. What would be the condition of the lower part of the car? Then I can give you an intelligent answer. Would there be any openings at all, or would you bottle up the bottom? Now, you have closed the curtains, as I understand you, you have closed the windows, you have closed down the upper berth. Now, would there be any opening anywhere in the bottom at all?

Q. I will assume the normal conditions of the car as it is usually running. Take a car in winter.

A. What do you call a normal condition?

Q. Well, I presume normal conditions for cold weather.

A. In other words, the normal conditions of a car vary just exactly as the outside atmosphere varies.

Q. Well, under the ordinary conditions, in your opinion, how long would it take that air to be changed, completely renovated?

A. Unless I misunderstand your question, I want to say two and a half minutes.

Q. You think that a man sleeping in the lower berth under those conditions——

A. I am not going to change my opinion on that now.

Q. You think that under ordinary conditions as to the car generally, with the conditions in respect to the particular berth described, that the occupant gets a renovation of air every two and a half minutes?

A. The total cubic capacity in air of that car is removed through the ventilators.

Q. What percentage of that air that is ejected through the ventilators comes from that particular berth, under those circumstances?

A. I don't think it is possible to measure any corner. I
63 have never known of any method where that could be done.

Q. Now from your own experience, isn't it a fact that under those conditions——

A. Do I clearly explain it to you when I say that down in that corner I don't believe the air would be as rapidly removed as it would up here. I can't tell you what that is.

Q. Isn't it a fact that under those circumstances, from your own experience, that when you get into a lower berth, close the window, draw the curtains and button them, and with the upper berth lowered, that the air gets very close in a very short time?

A. You can bottle it up tight so that absolutely no air gets in.

Q. Isn't it true that the air gets very close in a very short time, and you have either got to open a curtain or open a window for your convenience?

A. Why certainly. A car has got to be ventilated, it must be renovated.

Q. I am assuming the average car, with a ventilating system, that you are in a lower berth with the window closed and the curtains drawn.

A. Do you want me to tell you that if it were in just the condi-

tion you want me to tell you that it was in, I would get the porter immediately and either have him ventilate the car—There are thermometers and everything in the car—he isn't attending to his business—that is just what I would do if I were trying to make the car in the condition you show.

Q. Now, the raising of that upper berth——

A. That don't have anything to do with it, in my opinion. Don't you understand that.

Q. Just answer my questions, and don't put questions to me.

A. Pardon me.

Q. In your opinion it makes no difference whether that upper berth is lowered or closed then, is that true?

Mr. VAN ALSTINE: He doesn't say that.

64 A. I didn't say that. I am not going to. Can I have that first answer of mine read again? Under the conditions as I answered you in my first answer——

Q. You don't understand me. Under the conditions as I stated: the windows closed, the lower berth occupied, the curtains are drawn, the upper berth is down; now assume that the upper berth is raised, does that make any difference with the conditions prevailing in the lower berth?

A. Very little.

Q. Very little?

A. Very little; possibly two per cent.

Q. Now, assume that the window is raised. Does that make any difference? The window of that berth.

A. I guess you will have to read that answer.

Q. Can't you answer that question?

A. Why, certainly, I can, and I am going to try to answer it for you again.

Q. Answer it by yes or no.

(Question read.)

Mr. VAN ALSTINE: Make any difference in what?

Mr. JACKSON: In the conditions, traveling in that lower berth, as to air.

A. I will answer it in this way: The total ventilation of the car will be in direct proportion to the opening of the windows and the opening of the ventilators, and deflecting place such as the upper berths won't have very much to do with it.

Q. That's the best answer you can give to that question is it?

A. I can give you any answer you want, I think.

Q. Well, let us have it then.

Mr. VAN ALSTINE: I think he answered that before.

Q. Well, the opening of the window would surely in your judgment be an important factor in ventilating that lower berth?

A. The opening of the window?

Q. Certainly.

65 A. The most important factor in the whole——

Q. All the elements that I have mentioned.

A. You couldn't ventilate the car unless you opened something.

Q. Then wouldn't it have been easier to have answered my former question by answering that it would affect it materially?

A. It wouldn't if I didn't believe it.

Q. You say now that the opening of the windows is the most important factor, do you not?

A. I think I know about—I know what it is.

COURT: The question is whether that is what you say now.

A. Well, read the question.

(Question read.)

A. I do not say it is the most material factor.

Q. What is the most material factor then?

A. I say the combination of the opening of the ventilators and any openings below govern entirely the amount of air passing in and out from the car.

Q. Now, I am going to assume that you are occupying a lower berth and that the windows are closed, the upper berth is lowered and the curtains are drawn, and that you want to get more air. What would you do under those circumstances to get it, the car being under ordinary conditions?

A. Ask the porter to open the window.

Q. That would change the conditions in there more quickly and more effectively than doing any other one thing, would it not?

A. I should say opening the curtains would do about the same thing.

Q. And that would depend upon the conditions of the air out in the aisle, as to whether you got the same results or not, whether it was good air outside or not?

A. I should say that would depend on the rapidity of the air passing from the outside into the car and upward.

66 Q. Now, would you not accomplish practically the same results by having the upper berth raised, instead of opening the curtains?

A. I don't think there would be any air come from that direction which would help very much. There isn't but one thing in my mind that the upper berth can be closed for, and that is that it would act as a baffle to the air passing upward.

Q. Now, if you raise that upper berth, then you have got a direct draft coming through the window and going up through the top?

A. Not any faster whether the berth is upward or downward, because the eduction or the emission of air is governed entirely by the capacity of the ventilator. In other words, if the berth were down and the car standing still, there would be absolutely no difference whether it were down or up, absolutely none in my opinion.

Q. It is your judgment then that the ventilator draws the air in through the window and up under or through the curtains, practically as quickly and as efficiently as though the upper berth were thrown up and closed?

A. Very little difference.

Q. So that it makes really no difference to the occupant of the

lower berth, in your opinion, whether the upper berth is open or closed?

A. Very little I should say.

Q. And in that respect you differ with the opinions expressed by the witnesses who preceded you?

A. I tried to specify that, just how much.

Q. I am simply calling your attention to that fact. You differ with them in that respect?

Objected to as improper. Objection sustained. Exception by plaintiff.

67 STATE

VS.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

June 10, 1912. 11 A. M. Trial resumed.

THOMAS R. CROWDER being first duly sworn testified in behalf of the defendant as follows:

(Examined by Mr. VAN ALSTINE:)

Q. Where do you live?

A. Chicago.

Q. How long have you lived in Chicago?

A. Fourteen years.

Q. What is your business or profession?

A. I am a physician.

Q. State whether you are now in the practice?

A. I am not in the practice of medicine.

Q. How long is it since you ceased to practice medicine?

A. Seven years and a little more.

Q. What has been your occupation since you quit the practice of medicine?

A. I am superintendent of sanitation for the Pullman Company.

Q. In what way did you become familiar with sanitation principles?

A. By a personal study of conditions of car operation.

Q. When did that study commence?

A. I commenced that about the time I took up the position I now hold, namely, seven years ago.

Q. How extensive has been your test of sleeping cars, how frequently or to what extent rather have you tested air in sleeping cars?

A. Well, I have made tests from time to time for the last four years about, of the air of sleeping cars, and that has continued through the examination of some 300 cars, and the examination of air samples from those cars to the extent of 3,000, I should say, 3,000 samples probably.

Q. When did you first take up the study of ventilation?

68 A. Something more than four years ago, possibly as long as five years ago; I can't place the date now.

Q. You may state whether or not you are a chemist?
A. I have some knowledge of chemistry, yes sir.
Q. And in what way did you obtain that knowledge?
A. I obtained that during my university education and subsequently in the medical school.
Q. What character of cars did you make tests of air in?
A. What character, is that the word?
Q. Yes, what character of cars, of what ownership?
A. My examination has been confined chiefly to sleeping cars, although I have examined the air from day coaches and street cars and elevated cars, to some extent.
Q. State, if you can, whether there is any appreciable difference in the quality of the air in sleeping cars and in day coaches?
A. On the average there is a considerable difference.
Q. With respect to the good quality of the air, which has the most good air?
A. Well, the sleeping car has air which has greater chemical purity.
Q. Can you give a reason for that statement?
A. Yes, I think that is dependent chiefly upon the number of occupants in those cars, each occupant tending to contaminate the air to a certain extent. When there are more the air is more contaminated, provided the air supply is the same amount.
Q. Assuming that a lower berth of a sleeping car is occupied and that the upper berth is closed, state if you can whether such condition would have any effect upon the air in the other berths in the car?
A. My experience leads me to believe that there is no detectable difference.
Q. Now, you may state to what extent you have made experiments to ascertain the fact that you have testified to.
A. Well, am I to understand the number of tests I have made in which there has been a berth or berths with closed uppers?
69 Q. You may state, if you please, the conditions under which you have made tests and to such length as you can recall.
A. Well, I have made tests under conditions in which the car was occupied during the day and all berths were closed. I have made tests in which a part of the berths were occupied and other sections were left as they would be during the day, that is, with the upper berth closed and the curtains unhung. Then I have made tests in cars in which there were all of the lower berths occupied and none of the uppers. Then in cars in which there were all of the lowers occupied and some of the uppers, and in a very few instances where all of the uppers were occupied as well. I have made tests furthermore in cars where there have been a number of berths occupied and in which there has been a section occupied—that is, a single berth or possibly two in which the upper berth was closed, but the lower berth was occupied. I think practically all conditions of occupancy which might be found in actual service I have investigated from time to time.

Q. Now, you may state the basis on which these tests were made—that is, what bad element was considered.

A. The basis on which the tests were made was that of the proportion of carbon dioxide or carbonic acid gas in the air of the cars.

Q. Now, you may state whether there is any other known basis at the present time?

A. There is no other basis which is taken as a standard for the judgment of ventilation efficiencies.

Q. Now, you may state the results that you obtained by these examinations?

A. The results in general are these: The contamination of the air is in general low in sleeping cars as compared to other occupied public places. The contamination of the air in the lower berths will be a little higher than the contamination of the air in the aisles opposite the lower berths. The contamination of the
70 air in the upper berths will be a little higher than that in the aisle and there will be as a rule, though not always, a slight difference between the upper and lower, the upper being slightly more contaminated than the lower.

Q. Now, you may state what percentage of carbon dioxide you have discovered generally in your experiments or tests?

A. That percentage has varied according to the conditions of ventilation of the car? It should be understood in expressing these percentages that I have studied several types of ventilation, and according to the efficiency of these different types the amount of contamination of the air has differed a little.

Q. Now, take the outside air, state whether or not that contains any carbon dioxide?

A. The outside air contains carbon dioxide always. Its proportion will vary from about 3 to 4 parts in 10,000 of air. The most usual finding is at or very near 4 parts in 10,000.

Q. Now, you may state the character of the cars that you have made tests in with respect to the ventilation that was used in the cars?

A. The ventilation of the sleeping cars that I examined was of two types, one of which I can best refer to as natural ventilation and one as exhaust ventilation. By those terms I mean that in the first instance there were no ventilating devices of a mechanical sort; the car was ventilated through the opening of windows, particularly by the opening of windows that we call deck sashes, located near the roof of the car. In the second type, which I refer to as exhaust ventilation, there were applied devices to the deck of the car which are intended by mechanical means to draw air out through the roof.

Q. Now take the natural ventilation and give us if you can the occupation of the car and the amount of carbon dioxide discovered in the berths.

A. You want average figures, I suppose?

71 Q. Average figures, yes.

A. I could not give you to the exact fraction the occupancy of the cars, but it was very near to 15 people in those in which I made tests. The carbon dioxide under those conditions where there was a partial opening of the deck sash windows, that is, the little

so-called upper ventilating windows, averaged for the lower berth 8.32 of carbon dioxide per 10,000 of air. It averaged in the aisle of those same cars by simultaneous testing 7.32 parts of carbon dioxide in 10,000. In a part of these cars upper berths were simultaneously observed and by a comparison of the carbon dioxide in those berths with what was found in the lower berths of the same cars it was enough higher so that if we strike a proportion between all of the lower berths examined and suppose we had examined all of the upper berths and they had borne the same relation to the lowers as those that were examined, the upper must have had 8.73 parts of carbon dioxide in 10,000. So that we would have, to summarize 7.32 parts per 10,000 in the aisle, 8.32 parts in the lower berths, 8.73 parts in the upper berths.

Q. Now, state whether you made any experiment to ascertain the effect on circulation produced by the curtain?

A. Yes, I made tests concerning that matter. It was a question which was raised in the early part of the work as to whether or not the difference between the contamination of the air on the inside of the curtain and on the outside of the curtain, that is, the aisle side, could be maintained simply by diffusion, namely, the molecular motion of the air, without having air currents. I set to work to determine what would be the difference, provided that difference were dependent upon the diffusion of carbon dioxide in air through an ordinary berth curtain, the standard berth curtain such as is used by the Pullman Company, and according to my experiments if the interchange of air between the aisle and the berth were dependent upon this diffusion process there would be maintained a difference of 42.5, about 42½ parts of carbon dioxide in
72 10,000, whereas the actual finding was a difference of 1.

Q. I understand that the actual difference you found to be about 1 per cent.

A. An average of 1.

Q. An average of 1 to 10,000?

A. 1 part per 10,000.

Q. And the supposed difference would be how much?

A. The difference that would be dependent upon diffusion alone, according to the diffusion ratio that I established by these experiments, must have been 42 plus, 42 parts per 10,000—that is, the air in the berth would be 42 parts — per 10,000 in carbon dioxide than the air in the aisle, if the difference were maintained by diffusion through the curtain and were not influenced by air currents. The basis of computation is the rate at which an individual occupying that berth would produce carbon dioxide.

Q. But the actual difference is 1 to 10,000?

A. Yes sir.

Q. Now, assuming that the upper berths are down, state if you can whether that would have any appreciable difference on the character of the air that would be maintained in the car?

A. No difference at all in so far as I have been able to determine.

Q. Now, assuming that the berths are all down excepting one, state whether the air would be any better in that particular berth than in the others?

A. The air, in which the upper berth is closed?

Q. Yes.

A. Provided that were occupied by the same single individual that the other berths are?

Q. Yes.

A. Yes, the carbon dioxide might be a little lower in that berth. It would theoretically and actually be a little lower in that berth than if the upper were down.

Q. Now, is it known what percentage of carbon dioxide is injurious to the human family?

73 A. Yes, that's known.

Q. Now, you may state what it is.

A. That answer to be entirely definite must have some relative qualities put into it. Carbon dioxide is certainly not harmful unless it is present in three or four per cent of the atmosphere.

Q. You say three or four per cent?

A. Yes sir.

Q. Now, that means three or four parts to a hundred?

A. To a hundred.

Q. Not to a thousand?

A. Not to a thousand.

Q. I would say 10,000.

A. Not to 10,000.

Q. Now, you may state the highest amount of carbon dioxid- that you have ever found in your tests?

A. In a sleeping car?

Q. In a sleeping car?

A. I have found as high as 20½ parts in 10,000. Yes, 20½ I think is the high figure.

Q. Now, state the lowest.

A. Well, the lower is 18, if my memory serves me correctly, as a single observation amongst a great many.

Q. The lowest?

A. Now wait a minute——

Q. I want the lowest amount of carbon dioxide that you have found in your tests.

A. Well, I have found carbon dioxide in cars as low as that in the outside air, that is 4 parts in 10,000.

Q. Now, Doctor, you may state if you can how the air operates that is in a sleeping car, as to whether it moves in a direct current or whether it does not?

A. My determinations of impurity have led to such uniform results when taking samples in different parts of the car body that I am led to believe that the mixture of the air is a very perfect one under all the conditions that I was able to observe, and

74 that there is a very general swirling movement of the air, resulting in a more or less thorough mixture.

Cross-examination by Mr. JACKSON:

Q. What do you regard the percentages of CO_2 as found in your tests as indicative of, Doctor?

A. Well, I have used that percentage of CO_2 simply as a basis of computing the volumetric air supply to that car.

Q. Is it not a fact that in experimentations of this kind the percentage of CO_2 found is used as an indication of the presence in the air of other substances?

A. Of other substances?

Q. Yes.

A. You can find certain theoretical, hypothetical statements concerning other substances, but you cannot in my opinion find a demonstration of those other substances.

Q. Now, it is your theory, Doctor, is it not, that the breath and the vapors from the body contain no poison, as many authorities state?

A. Contain no poisons?

Q. Yes.

A. They contain no poisons so far as my opinion goes, and so far I think as the evidence of scientific literature goes to show.

Q. But you will concede that others differ with you on that, will you not?

A. There are statements that differ with that, and I suppose you may call those authoritative. They belong in general though to the older literature on the subject of ventilation.

Q. So that in your opinion the air in a closed room does not become vitiated by the human breath and by the vapors from the human body?

A. The air may become vitiated, but the fact that it is changed chemically by the exhalations from the body is not the cause of that vitiation in my opinion.

75 Q. What is the cause of it?

A. The cause of that vitiation rests upon a physical alteration in the air which has a resultant effect upon the readiness with which the body may transmit its heat to the air.

Q. So that you regard the circulation of air as more important than the amount of oxygen that may come into a car, do you not?

A. Vastly more important, unless you exceed your changes far beyond those that are ever met with under normal conditions of ventilation, yes.

Q. So that according to your theory, if all of the windows and all of the doors in a car were closed, and there were no artificial ejector of air, you would accomplish practically all that is necessary by having fans in that car to keep that air in motion?

A. No sir; no, you would not.

Q. Well, according to your theory is it not a fact that the question of the ventilation of cars is largely a question of the regulation of temperature and keeping the air in motion?

A. Very largely.

Q. So that if you can regulate the amount of moisture in the air and keep it in circulation it is practically immaterial whether there is any new air coming into the car or not?

A. And regulate its temperature as well?

Q. Yes.

A. It is immaterial then up to a certain point, which is not

reached under ordinary conditions of ventilation, but it might be reached under artificial conditions imposed upon it, of course.

Q. Supposing that you were to confine a normal individual in a wooden box having the amount of cubic space that the lower berth in a car does when the windows are down and the upper berth is lowered and the curtains are drawn, according to your theory it would be immaterial whether or not that individual received the air from the outside, provided you could regulate the temperature of the box and the moisture?

76 A. If you could regulate the temperature and the moisture and the motion of the air it would be immaterial until he had changed that air far beyond what you will ever find under normal or natural conditions of ventilation, yes. It would be immaterial to his health, understand, if that is what I am to understand by it.

Q. Now, if a person were confined under those circumstances and manifests symptoms of dizziness or fatigue, to what would you attribute those conditions?

A. Those conditions are to be attributed to an interference with the heat transference of that man to his surroundings, and the ill effects that you describe are dependent upon what we call heat stagnation in his body, which goes back to a series of physiologic processes that are rather complicated, but nevertheless explain the effects.

Q. Now, you don't regard CO_2 as poisonous in itself until you get up to 3 or 4 per cent?

A. No, not at all.

Q. Well, what is the presence of 7 or 8 parts of CO_2 to 10,000 regarded as indicative of by men making tests of air in rooms

A. Simply regarded as indicative of that much contamination of the air by the products of respiration.

Q. In other words, they use CO_2 not to show that there is that much poison in the air, but to show the presence of other poisons in the air?

A. No, if they understand the proposition correctly, I don't think they use that to show the presence of other things in the air.

Q. Isn't it true that the amount of other impurities in the air is usually indicated and measured by the amount of CO_2 found

A. But I say there are no other measurable impurities in the air which go hand in hand with carbon dioxide.

Q. Well, that is your theory?

A. No, that is not a theory. So far as I am able to understand the facts, that is a fact.

77 Q. Well, is it not accepted as true by men who make experiments along these lines that the amount of CO_2 found is important, not in that it indicates so much carbon dioxide, but that it is indicative of the presence of other things in the atmosphere?

A. I think that theory has been entirely disproven.

Q. Well, I am not asking you that. I am asking you if that isn't used by others?

A. No, I don't think that is used as evidence of other things in the air. It is used as evidence of things which have been said might be in the air; but I say those have not been demonstrated.

Q. Suppose that this room were closed, made into an air-tight box, and there were 25 persons in here with different contagious and infectious diseases, and upon examination you found that the CO_2 was, we will say, 10 parts to 10,000 parts of air, what would that indicate to you?

A. That would indicate that there were being about 25,000 cubic feet of fresh air introduced into this room in an hour.

Q. What would it indicate to you in respect to the composition of the air you found in the room?

A. It would indicate to me that the air was contaminated with about 1 per cent of air that had been inspired and expired.

Q. Would you regard that as deleterious to a normal individual to breathe?

A. I would not.

Q. And that is the theory upon which you have drawn your conclusions in your direct testimony?

A. Well, I have not drawn any conclusions, I believe; I have stated facts in my direct testimony.

Q. You have expressed some opinions. That is what I mean by your conclusions.

A. Well, yes, possibly I did in regard to the significance of that CO_2.

78 Q. Now, take this case: Suppose all of the windows and doors in a sleeping car of usual design were closed, and there was no ventilation excepting the natural ventilation as you call it, and there were 10 persons in that car with tuberculosis, and an examination of that air revealed that the percentage of carbon dioxide was 8 to 10,000 parts of air would you regard that as a healthy place for an individual to enter and sleep?

A. So far as the chemical contamination of that air is concerned, perfectly healthy. But your ten cases of tuberculosis might complicate the thing on an entirely different score.

Q. That is the complication I am attempting to get at. Now, what effect upon the air of a car would a person with tuberculosis have?

A. Well, he would have no other effect upon the air of a car, as air, than any other person; that is, he would contaminate it with carbon dioxide which he exhaled.

Q. Would his presence in the car have any other effect than that?

A. Upon the air?

Q. Yes.

A. It would have no other effect upon the air, except we would have to come then to a consideration of bacterial pollution of the air perhaps by that man coughing and so on.

Q. Now, isn't that an effect upon the air?

A. What effect would that have upon the air?

Q. Isn't that an effect upon the air?

A. Well, we may call that an effect upon the air, yes; that is a physical effect though. I mean that you are throwing into the air particles of matter.

Q. Well, does not the human body throw into the air particles of matter?

A. Oh, yes.

Q. Now, aren't those particles poisonous?

A. Those particles are not ordinarily poisonous.

Q. May they not be poisonous, according to the nature of the disease the person has?

A. They are not poisonous from the chemical standpoint.

79 Q. Are they not from the physical standpoint?

A. They might be bacteria and infectious. We do not refer to those as poisonous.

Q. Now, take the case of a man with smallpox. Would not the air become permeated with particles from his body, if he happened to be in the sloughing stage?

Objected to.

Objection overruled. Exception by defendant.

A. So far as we are able to understand the disease of smallpox, it must be transferred from person to person entirely by an organismal matter, that is, a bacterium or a vegetable or animal organism of some sort. Now, if that is transferred through the air, it is transferred as a bacterium, and it is not a poison, it is an infection. So I would answer your question in that way, that he may infect the air around him by throwing particles into it; he might do that.

Q. You draw a distinction then between the contamination of the air itself, chemically speaking, and the transmission through the air by particles emanating from the skin containing bacteria, which you call infection?

A. Yes, that distinction seems clear to me.

Q. Now, you believe that contagious diseases and infectious diseases are sometimes contracted on sleeping cars, do you not, and other coaches?

A. Well, I don't know about that.

Q. Well, don't you believe they are?

Objected to as incompetent.

Objection overruled. Exception by defendant.

A. I must only answer that in this way, that I believe infectious diseases are transmitted as a rule from person to person by fairly direct or close contact. That might come about in a sleeping car the same as in this room or anywhere else.

Q. A contagious disease might be contracted in the same way?

A. A contagious disease might be contracted in the same

80 way, in a sleeping car, under the same conditions that it would be contracted in any other place, by the same sort of contact, yes.

Q. Now, as I understand your theory, the circulation of air in the car is a most important element of proper ventilation?

A. Yes sir.

Q. Is not the ventilation of a car affected in direct proportion to the number of upper berths that may be closed?

A. No sir.

Q. Assume that all of the lower berths in a sleeping car were occupied and the curtains were drawn, would it not make some difference as to the circulation of the air in the car generally whether all of the upper berths were lowered or closed?

A. According to my experience there is no detectable difference under those circumstances; though of course—I must add this—that I have not examined a car in which all of the uppers have been closed and all the lowers have been occupied; but I have examined those in which they are partly in that condition, and I have been able to detect no difference on account of the closure of those upper berths.

Q. In the ventilation of a sleeping car what is the source of supply there usually dependent upon?

A. That will depend of course upon the plan of ventilation you are using.

Q. Take natural ventilation first.

A. It is either crev*asses* about windows and doors and deck sashes, or it is open doors or open windows or open deck sashes.

Q. Well, in the element months, in the summer, the greatest amount of air that comes into a car comes in through the windows in the lower berths, does it not?

A. The open window, yes.

Q. Now, do I understand you to say that it is immaterial
81 whether the upper berths are closed or lowered in so far as the amount of that air that may get — the interior of the car is concerned?

A. Immaterial?

Q. In other words, the upper berths and the curtains offer no obstruction to the circulation of the air?

A. I cannot put it quite so strong as that, that they offer no obstruction, but they do not materially interfere with the movement of air coming in or going through. A great quantity of air can pass through the curtains under a fairly slow current. If you would attempt to force air through a berth curtain at a very high pressure then your resistance would become a very material element.

Q. Now, assume that the windows are closed in the lower berth, the upper berth is lowered and the curtains are drawn, how frequently, in your opinion, is the air in that space replaced?

A. Now, is that the question, that the lower berth is closed and the curtains are drawn?

Q. And the window closed.

A. And the window closed.

COURT: You said the lower closed. You mean the upper.

Q. The upper berth is down, the lower berth is occupied.

A. That is the ordinary way of running with a lower berth under present conditions? Taking an individual lower berth you will find that a rather variable quantity even under apparently

identical external conditions, but on the average that can be determined quite accurately from the figure that I gave a while ago, namely, that the average carbon dioxide is 8.32 parts per 10,000 in that berth. Now, in order to maintain that level of CO_2 you would have to supply, if my memory serves me correctly, approximately 1,400 cubic feet of air per hour. Now, your berth has perhaps 65 cubic feet within this space that you have mentioned. Simply divide 65 into 1,389, to be exact, and you have the answer. I am not a mathematician, I can't give it offhand.

82

Q. We are speaking now with reference to natural ventilation.

A. Natural ventilation, yes.

Q. Does the Garland ventilator affect that to any appreciable degree?

A. That increases the ventilation quite materially.

Q. To what per cent would you say?

A. Well, it is the difference between 1,389 cubic feet as an average air supply for the lower under natural ventilation, and 2,027, according to my figures, the ventilation with the Garland ventilator. That is an increase of something over 600 cubic feet; approximately a 50 per cent increase.

Q. You have very likely occupied a lower berth under the conditions stated in the last question, have you not?

A. I have occupied a lower berth under those conditions, yes sir.

Q. You find it perfectly comfortable to ride that way all night?

A. Sometimes it is and sometimes it is not.

Q. Have you ridden in a lower berth when the upper berth was raised?

A. Many times.

Q. Have you noticed any difference between the condition of the air under those two conditions?

A. I must answer it the same way, sometimes it is perfectly comfortable and sometimes it is not.

Q. I am asking you if you noticed any difference in the condition of the air?

A. No, I can't notice any difference, because I have not ridden in the same berth under the same identical conditions at the same time. That is the only way I could compare those.

Q. Now, Doctor, you have very likely ridden in a lower berth on many occasions, with the upper berth closed, have you not?

83

A. Yes sir.

Q. I am going to ask you if it is not a fact from your own experience in occupying a berth, that you have more air and more comfort, especially in warm weather, under those conditions, than you have with the upper berth down?

A. No, I can't say that in my experience that is a fact.

Q. Well, do you think it makes any difference in the temperature of the lower berth whether the upper is down or closed, in warm weather?

A. Well, I have never tested out those temperatures. It would certainly be very small. If I would attempt to base it on my air

supply figures and figure out the theoretical difference, it would be very small.

Q. We will assume a sleeping car on a side track, and the air outside is 90 degrees Fahrenheit, do you think there would be any difference to the occupant of the lower berth when the window is closed and the curtains were drawn, as to whether the upper berths were up or down?

A. Yes, that particular lower berth, there would be a difference, provided he is unable to get a breeze from the outside; upon that will depend his comfort, and upon no essential difference in the space he is occupying, unless you shut off his air supply, confine him to that and give him no air supply, which is a practical impossibility, then you will find a considerable difference, because you might interfere with a very useful function, you may interfere with his getting rid of his own excess of heat.

Q. Now, as I understand it, the Garland ventilator is located in the top of the car and its purpose is to eject air from the car?

A. Yes.

Q. And of course in order to eject air from the car, air must come into the car?

A. Yes.

84 Q. Now, when the windows of the berths are opened the air comes through that source principally, I take it?

A. The open window?

Q. Yes.

A. Yes.

Q. Now, we will take the case of a particular open window in a particular berth, the window is open, the ventilator happens to be above the particular section, the ventilator operates to draw a current of air into that window and up and out the top of the car, does it not? What is the line of the air current under those conditions?

A. What is the course of the air current?

Q. Yes.

A. My experience in these air tests leads me to believe that in the first place we cannot definitely follow that air current, and we can't follow it for the reason that there is no direct air current from any inlet to any outlet. We are bringing the air in in one direction, it has a directed stream, we are taking it out with a stream which is directed in another way; if it is on the same side of the car it will be exactly the opposite direction to that. Now, the air that comes in at your window is thrown into many whirls and eddies and it enters the air of the body of that car. The exhaust from the Garland ventilator is not great enough to cause a direct pulling from this inlet to that outlet, because it is not great enough to cause any appreciable difference in the barometric pressure of your inside air and your outside air; that is, it isn't strong enough to make a vacuum there, an appreciable vacuum.

Q. Have you read the testimony given by the witnesses that preceded you, Doctor?

A. I have read that, yes sir.

Q. You don't agree with some of them?

A. I don't agree with a good deal of that, no sir.

Q. And it is upon the theory you have just stated, I presume, that you base your conclusion that it is immaterial whether the upper berth——

85 A. That isn't upon a theory, that's based upon my examination of air for the determination of its contamination. Now, if it were a fact that the air goes straight from that window up and out of the ventilator exit, I ought to be able to trace a fresh air stream, contaminated by anybody's breath, but you can't trace that. As a matter of fact, I would say further, when you are dealing with open windows your contamination of air falls to a very low point throughout the whole car.

Q. So that the subject of ventilation becomes most material in the winter months, when the windows are not open?

A. Oh, yes.

Q. But according to your theory you even then regard the circulation of air as more important than the amount of fresh air coming in?

A. Circulation and temperature.

Q. Now, they use revolving fans frequently in coaches, do they not?

A. I believe so.

Q. That is to keep the air in circulation?

A. Yes sir, that is the purpose.

Q. And that is quite an important consideration?

A. That's quite an important consideration.

Q. What effect would the lowering of the upper berths and the hanging of the curtains have upon the amount of air that might reach the lower berth under those circumstances?

A. I didn't catch the last of your question.

(Question read.)

A. That is, the current that is caused by the fan?

Q. Yes.

A. In my opinion that wouldn't have any effect except under the conditions that you put a fan up above the upper berth and blow down into it, of course for that particular berth it would.

Q. Where are fans usually placed, in the car?

86 A. The fans are usually placed, I believe—this is a mere matter of observation—to my understanding they are usually placed at the end of the car.

Q. And they shoot right down the aisle?

A. They shoot right down the aisle.

Q. In your opinion would it make any difference to the circulation of air in a lower berth whether the curtain was open or closed?

A. No, I don't believe it would make any difference. You are stirring up a lot of air that will play upon all parts of this curtain and it enters through the lower half and the upper half. Now, if you have no dividing plate in that you have got it playing into one place; if you have one, you have got it playing in the lower and in the upper about the same.

Q. You have occupied a lower berth when there was a fan operating in the car, have you not?

A. I think I have.

Q. Did you ever stick your head out into the aisle?

A. Oh, yes, I have stuck my head out into the aisle.

Q. Did you get any more draft out there than in the inside?

A. If you stick your head out into the aisle you get right directly in the current of that fan.

Q. More circulation of air out in the aisle than in the berth?

A. Oh, yes, certainly.

Q. What is the cause of the difference?

A. Why, the fan is propelling a particular current in a particular direction.

Q. Well, if you open the curtains wide open under those circumstances you will feel more air coming into your berth, won't you?

A. Well, you would feel more air if you opened the curtains wide and directed the fan so that it would reach that point.

Q. Then the curtains do have some effect upon the circulation of air?

A. Oh, they might have some effect upon the circulation of air, certainly.

87 Q. Wouldn't the upper berth have the same effect as the curtain would in that respect?

A. You are proposing a condition in which the circulation of your air is confined to one side of a curtain. Now, if you put a dividing plate on the other side of that curtain in a horizontal direction—no, it wouldn't have any effect.

Q. Well, now, take this condition: The lower berths of a car are occupied and the windows are down and the curtains are drawn, and there is a revolving fan at the end of the aisle, would it make any difference as to the circulation of air, in respect to the occupants of those lower berths, whether the upper berths were raised or lowered?

A. Well, I don't believe it would. I don't believe it would—that's my opinion—for the very reason that I have stated, namely, that you are applying your air circulation, your air eddying, you are kicking it up on one side of the curtain, and it makes no difference whether you put a dividing plate on the opposite side of that curtain in a horizontal plane, it makes no difference about what will occur through this curtain.

Q. Now, these experiments that you have made have been made for the Pullman Company, Doctor, I understand?

A. They have been made while I was occupying my position with the Pullman Company. These experiments were made in the first place not at the instance or request of any officer of the Pullman Company, however.

Q. Well, they have been made as part of your duties while in the employment of the Pullman Company?

A. As a part of the work I did in the interest of my position, yes sir.

Q. You have done some riding on these lines, I believe, Doctor?

A. Yes sir, I have.

Q. I hand you volume 7, Archives of Internal Medicine,
88 1911, and refer you to page 85 and ask you if you are the author of that article?

A. I am the author of that article, yes sir.

Q. And that article expresses the result of your experiments and your opinion on the subject of car ventilation?

A. Yes sir, so far as they had been determined up to that time.

Q. Have you had occasion since the writing of that article to change your view on any subject embraced in that article?

A. Not in any material sentence.

Q. How many feet of cubic air per hour, in your judgment, does the average adult individual require to maintain health?

A. That will depend upon the physical conditions of his air. So far as air supply is concerned, designed to supply the chemical needs of a man's body, certainly a few hundred cubic feet would answer his purpose. But if we are considering the effect that that air is going to have upon the heat removal of his body, it may require a great deal or it may require a little. In the summer time, with the temperature about 90, we must have a wind blowing over us. Then the amount of air that a man needs becomes enormous. In the winter, when the air that comes to a man is cold or is cool, a man can get along quite as well with a relatively very small amount.

Q. Now, the additional amount of fresh air that he may get in the summer is material in that it creates a draft or a current, to remove the bodily heat?

A. Exactly.

Q. So that it is not so much a question of fresh air as it is a question of the circulation of that air?

A. Yes. It isn't a question of pure air, I should say. It is a question of circulating air to get his heat away.

Q. You stated a few hundred feet. I wish you would give
89 me the figure you had in mind, if you can, as to the number of feet required for an individual per hour?

A. The number of feet required for an individual per hour?

Q. Per hour, to maintain health.

A. I have said that that will depend altogether upon the physical conditions of that air. It may be a few hundred feet——

Q. What do you mean by a few hundred feet?

A. Well, I will say five hundred—that certainly is a high enough limit—or it may be thousands of cubic feet, depending upon the conditions under which he is located. Now, if you will allow me to add this: The amount of air that a man needs to maintain health is a question quite apart from what benefit he might have by going into the open air and getting in the wind and so on. The maintenance of his health temporarily while he is going to be confined in any small space is dependent upon the readiness with which you take away his heat, and not upon the chemical purity of the air, therefore not upon the amount of air you are supplying to the man; but by confining him in any way, even though you are going to remove

his heat rapidly enough, and keeping him in a small place, you would ultimately injure your man.

Q. So that according to your theory you can answer all purposes of ventilation in a school room by having fans keeping the air in motion and keeping the temperature down?

A. If you want to maintain the health of a school child you will give him always cool air and keep it circulating; whether you do it by a fan or by propelling cool air through windows or other places doesn't make any difference provided it is cool.

Q. But in your opinion it is more important to keep the air in a room circulating than it is to get cool air in?

A. Than it is to get so much of it, is that the question?

Q. Yes.

A. Yes sir, it is much more important.

90 Q. What is the best temperature, in your opinion?

A. Well, the best temperature will again depend upon how much clothing a man has, and so on.

Q. A normal individual.

A. Certainly lies below 70. I would say 67 up to 70 is good. When you get a very little above 70 it is very easy then for the lack of motion and a little too much moisture to bring about conditions which are real bad. If you maintain it below 70 you are not very likely to have bad conditions, harmful conditions.

Q. Now, if it be true that there are poisonous substances in the air of a room, which are deleterious to the human body, does it make any difference whether they are taken into the body at 90 degrees or 60 degrees?

A. Whether what?

Q. Whether they are taken into the body at 90 degrees or 60 degrees Fahrenheit?

A. So far as I know, there is no evidence that one would be any worse than the other.

Q. In other words, if you are breathing air affected with pneumonia you are just as apt to contract the disease and take it in at 60 as you are at 90, are you not?

A. So far as the air that you breathe is concerned, I see no reason why you would not contract it at 60 just as readily as at 90.

Q. So that your conclusion and your opinion is based upon the fact that there is no substance in the air deleterious to health excepting CO_2?

A. No, my opinion is based upon the fact that by the time the air gets into your lungs it is practically at bodily temperature, 98; it doesn't make any difference where it starts, at the nose, or throat, when it gets into the lungs it is run up to bodily temperature.

Q. If you are breathing air which is contaminated by microorganisms, it is immaterial, as between 60 and 90 degrees, what the temperature of the air is, is it not?

A. Immaterial?

Q. Yes.

91 Q. Well, if I catch the drift of your question correctly, I would say yes, it is immaterial; if I understand what you

mean, and that is, that the organism is more likely to land and grow because it comes in an air of one temperature rather than the air of another temperature. I don't think there is a bit of difference.

Recess until 2 o'clock P. M.

2 P. M. Trial resumed.

Redirect examination by Mr. VAN ALSTINE:

Q. Doctor, in your examination about a closed box, will you state upon what you based your statement that you made.

A. I made the statement that the harmful effect was not due to the chemical impurity of the air, but to the difficulty of the occupant of that box giving up his heat to the surrounding air. That is based upon this experimental fact, that when one has contaminated that air to a high degree, and has remained in the box such a length of time that he becomes very uncomfortable, begins to develop headache and symptoms of illness, that he is in no way benefited by breathing pure air from the outside of the box through a tube, but that he is benefited, all of his symptoms and all of his discomforts can be made to almost immediately disappear, either by putting the air in rapid motion by means of a fan or by cooling the air to that point where it is able to take up heat rapidly by direct radiation or by drying the air to such a point that his sweat is evaporated with rapidity, because it is well known that the evaporation of sweat is a process that requires the absorption of a great deal of heat. Now, upon those experimental facts we say that it cannot be due to the chemical purity, because when we get any chemically pure air to breathe it produces not a bit of effect. It must be due to the interference with his heat transference, because when we bring about physical conditions in the air that enable him to give up his
92 heat with rapidity all his symptoms disappear and his comfort is restored. There is a further fact that might be brought out in connection with that. When the occupant of the box has contaminated his air to a very high degree and he has increased its heat and so on until his discomfort has become great, there is no effect produced on one on the outside, living in a cool and moving air, if he breathes that highly contaminated air from the inside of the cabinet through a tube, it produces no effect upon him.

Q. Now, as to the uniform condition of the air throughout the car—I don't know whether I asked it or not, but I ask it now—did the tests you made or any of them include cases where the windows had been opened on some of the berths, and a test made of air in berths where the windows were not opened?

A. Yes, I have made tests under those conditions. To give a specific instance, I have examined a car where there were four berths with open windows, the windows being opened to the extent of about five inches and a small screen in place. Now, those screens let in a large quantity of air, and of course the contamination of the air in that particular berth must necessarily go to a very low point. But by extending the observation to the other berths in the car, those

which had no open windows and which were closed up in the ordinary way of using a lower berth, I found also that the contamination of that air lay within about half a part in 10,000 of the normal outside air. That is to say, that the large excess of air entering through the windows, through the open windows of those closed berths, finds its way by swirls and eddies practically throughout the car in pretty nearly uniform distribution. So that by increasing the air supply very largely from a single point we increase the air supply to all parts of the car and thereby bring down the contamination or the products of expiration in all parts of the car.

Q. Now, in the tests that you made state whether the cars were in motion or standing, or whether you made both?

93 A. I have made both. The instance that I refer to in my last answer is in a moving car. That answer would apply to the still car as well, but with this provision, that in the still car the air supply would be very much less. It is found that in that still car the carbon dioxid- in the other berths is also kept below the point where you would expect to find it in a car that had no open windows, and the relation obtaining between the occupied berth without an open window and that with an open window is essentially the same, though with an actual difference which is greater between the two in the running car.

Q. The actual change of air is more rapid in the moving car than one standing?

A. Very much more rapid, unless you have a car standing in a very high wind, and then you might get a considerable advantage. Sometimes we do find the carbon dioxid- remaining low if the wind is high, but if the wind is low it runs considerably higher than we ever find it in the moving car.

Q. Now, what amount of carbon dioxide is contained in the air that is exhaled by the person breathing?

A. The exhaled air contains on an average about 4½ per cent of carbon dioxide; we may say roughly from 4 to 5 per cent, but on the average about 4½ per cent.

Q. Now, in the air that is inhaled, do you know what percentage, if any, of air containing carbon dioxide over the normal amount in the outside air that is breathed?

A. Well, if we are standing in perfectly pure air we exhale and we inhale, the air that we actually take down into the deep part of the lungs consists of a mixture of the pure air that we take in from the outside and the already expired air or the already highly contaminated air that was lodged in the trachea, that is in the windpipe, and in the nasal passages and in the larger bronchial tubes. Now, the amount of that air which is already contaminated with the products of expiration, essentially expired air, is to the whole amount of air we take in in an ordinary quiet inspiration, as about

94 1 to 3, that is about one-third of the air that we inspire if we are breathing quietly is air that has already been expired and has lodged in the upper air passages.

Q. Now, what do you say as to that process, whether it is a harmful or not harmful process?

A. No, that is not a harmful process. It cannot be a harmful process in the nature of things. It is a conservative and useful process, and for this reason, that if the blood is deprived of its carbon dioxide, which is always held in solution, then a man is not stimulated to breathe and he ultimately is deprived of the oxygen which is necessary to the carrying on of the chemical processes of his body. Now, it is not a fact that the simple lack of oxygen in the blood stimulates respiration, but it is a fact that the presence of carbon dioxide in the blood stimulates respiration; so that a man's breathing is not dependent upon want of oxygen at all, but it is dependent upon the concentration of carbon dioxide in the blood. The higher that concentration goes the more heavily and deeply will a man breathe. When it goes very much below the normal, and that normal is equivalent to a pressure equal to about 5 per cent of atmospheric pressure, then his respiration is depressed, and if it goes very low he may stop breathing entirely, and he will not again begin to breathe until the carbon dioxide produced by the chemical processes in the blood has been brought up to that point where it is able to stimulate the respiratory center and bring about then the reflex act of breathing.

Defendant rests.

Mr. JACKSON: The plaintiff moves to strike out all of the testimony, on the ground that the answer does not state facts sufficient to constitute a defense.

COURT: For the purpose of the trial the motion stands denied.

Exception by plaintiff.

Plaintiff rests.

95 STATE OF WISCONSIN,
Dane County, ss:

I hereby certify that I have carefully compared the foregoing with the short hand notes taken by me on the trial of the above entitled action and find the same to be a full, true and correct transcript thereof and containing all the testimony taken and proceedings had on said trial.

Dated June 14, 1912.

EDWARD H. SMITH,
Official Reporter, Ninth Judicial Circuit.

Findings of Fact and Conclusions of Law Requested by Plaintiff.

The above entitled action coming on to be heard before the court, a jury having been waived, the court having listened to the testimony and heard the arguments of counsel makes and files the following:

Findings of Fact.

1. That the allegations of the complaint are proven and true.
2. That the closing of unoccupied upper berths in sleeping cars of the design in general use, such as the car "Waubeno," when the

lower berths are occupied, inures to the comfort, convenience, health and welfare of the occupants of such cars generally.

3. That the closing of such unoccupied upper berths, as required by said chapter 272, laws of 1911, does not impose any burden upon persons engaged in operating sleeping cars, nor does it deprive them of the use of any property.

4. That the requirements of said chapter 272, laws of 1911, are not unreasonable as applied to sleeping cars of the usual design, in common use, such as the car "Waubeno."

5. That the car "Waubeno," on the occasion in question
96 was engaged in intra-state traffic, and that the contract made by the defendant with the said James P. Hall related exclusively to intra-state traffic.

Conclusions of Law.

1. That chapter 272, laws of 1911, is a valid exercise of the police power.

2. That chapter 272, laws of 1911, is valid as an amendment and alteration of the corporate charter of the defendant under the power reserved by the constitution.

3. That the plaintiff is entitled to judgment as prayed for in the complaint.

Let judgment be entered accordingly.

By the COURT:

—— ——, *Judge.*

Dated, July 8th, 1912.

Each of the foregoing requests to find is refused as immaterial, contrary to the evidence as already found.

July 8th, 1912.

E. RAY STEVENS,
Circuit Judge.

Now comes the plaintiff and excepts to the foregoing refusal of the court.

L. H. BANCROFT,
Attorney General;
RUSSELL JACKSON,
Deputy Attorney General,
Plaintiff's Attorneys.

Findings of Fact and Conclusions of Law.

The above entitled action coming on to be heard before the court, the parties having by stipulation waived a jury, and the plaintiff appearing by Russell Jackson, deputy attorney general, and the defendant by C. H. Van Alstine, its attorney, and
97 the court having listened to the testimony of witnesses and the argument of counsel makes and files the following:

Findings of Fact.

1. That on August 17, 1911, James T. Hall was a passenger from Portage, Wisconsin, to Star Lake, Wisconsin, on a sleeping car owned and operated by the defendant; that he engaged, paid for and occupied a lower berth on said sleeping car, that the upper berth of said section was not engaged or occupied; that he demanded that the upper berth of the said section remain closed, pursuant to the provisions of chapter 272, laws of 1911; that defendant, acting through its agents and servants, refused to close the same, but left the same down though the entire night.

2. That the closing of upper berths in sleeping cars has very little effect upon the circulation of air in such sleeping cars when all lower berths are made up and ready for occupancy.

3. That the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths in sleeping cars.

4. That the closing of the upper berth will be a convenience to the person occupying the berth below the same and will add to the comfort of such person alone and not to that of the public generally.

5. That the defendant has a right to charge for the use of the space occupied by the upper berth and that such right is the property of the defendant.

Conclusions of Law.

1. That chapter 272 of the laws of 1911 is not a valid exercise of the police power.

2. That chapter 272 of the laws of 1911 is not a valid exercise of the reserve power to alter or amend the charter of the defendant.

3. That chapter 272 of the laws of 1911 is void and of no
98 effect, because it takes defendant's property without just compensation and without due process of law.

4. That judgment be entered dismissing plaintiff's complaint.

Let judgment be entered accordingly.

Dated July 8, 1912.

By the Court:

E. RAY STEVENS, *Judge.*

Either party may within three days from the date of these findings present to the court, serving the same upon opposing counsel, requests for additional or suggestions as to the form of the above findings.

Exceptions to findings:

Now comes this plaintiff and excepts to the findings of fact and conclusions of law heretofore made and filed by the court in this action as follows:

1. Plaintiff excepts to the second finding of fact therein contained and to the whole thereof.

2. Plaintiff excepts to the third finding of fact therein contained and to the whole thereof.

3. Plaintiff excepts to that part of the fourth finding of fact therein contained which reads as follows: "and will add to the comfort of such person alone and not to that of the public generally."

4. Plaintiff excepts to that part of the fifth finding of fact therein contained which reads as follows: "That the defendant has a right to charge for the use of the space occupied by the upper berth."

5. Plaintiff excepts to that part of the fifth finding of fact therein contained which reads as follows: "and that such right is the property of the defendant."

6. Plaintiff excepts to the first conclusion of law therein contained and to the whole thereof.

7. Plaintiff excepts to the second conclusion of law therein contained and to the whole thereof.

8. Plaintiff excepts to the third conclusion of law therein contained and to the whole thereof.

99 9. Plaintiff excepts to the fourth conclusion of law therein contained and to the whole thereof.

L. H. BANCROFT,
Attorney General of Wisconsin,
Attorney for Plaintiff.

Dated July 12, 1912.

Memorandum of Decision.

By the COURT:

Whether chapter 272 of the laws of 1911 can be considered as an exercise of the police power or of the reserve power to alter or amend the charter of the defendant, its validity must be tested by the prescribed constitutional limitations which circumscribe legislative action.

The owners of sleeping cars have the same right to exact compensation for the use of the space occupied by the upper berth that they have to charge for the use of the lower berth. The right to use this space occupied by the upper berth and to charge others for the use of the same is their property and is protected by the same constitutional guaranties as any other private property.

The evidence establishes the fact that the opening of the upper berth is not dangerous to the lives, health or safety of the public or of such portion of the public as may occupy the lower berth. Giving the evidence the most favorable construction that it will bear, the closing of all upper berths in a sleeping car will not have sufficient effect on the general circulation of the air in the car to affect the health of persons occupying the lower berth. The closing of the upper berth does not affect society as a whole or that part of it which travels in sleeping cars, but is a convenience to the person occupying the lower berth and one that adds to his comfort alone. This is not sufficient to bring the act within the legitimate

100 exercise of the police power on the ground that it is one promoting the comfort of society.

Counsel for the plaintiff suggests that the occupants of the lower

berths may be considered as a class with whom the legislature may deal in exercising the police power. But the court has found no legitimate basis upon which such a classification may be made.

As an exercise of the police power the act must bear the test of the constitutional limitations stated in State v. Redmon, 134 Wis. 89, 102-113. Indeed the law seems to be subject to the same objections on principle as those which led to the condemnation of the law there under consideration. If the situation in the sleeping car is such that the interests of the public generally require that the upper berths remain closed, then such berths should be closed in all cases and their closing should not be made dependent on the chance of the upper berth being engaged or occupied.

In the Redmon case the law under consideration was condemned because the closing of the upper berth was left to the option of the occupant of the lower berth. In the case at bar the closing of the berth is determined by the fact that the upper berth is not engaged or occupied. The court concludes that chapter 272 of the laws of 1911 cannot be sustained as a valid exercise of the police power for reasons stated in State v. Redmon, 134 Wis. 89.

In considering chapter 272 of the laws of 1911 as an exercise of the power reserved to alter or amend the charter of the defendant, we must keep in mind the fact that the right to use and charge for the use of the space occupied by the upper berth is the property of the defendant and that it is protected by the same constitutional guarantees as any other private property.

"The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted. * * * The reserve power stops
101 short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provisions of the constitution to the effect that private property shall no be taken for public use without compensation." State ex rel. Northern Pac. Ry. Co. v. Railroad Commission, 140 Wis. 145, 157-8. "It is to be construed like all constitutional provisions to harmonize with other commands and restrictions of the same instrument, and it must always yield to that paramount provision of the federal constitution which forbids the state to deprive any person of life, liberty or property without due process of law and to the substantial equivalent of the latter in our state constitution." Water Power Cases, 148 Wis. 124, 136.

In reaching its conclusion with reference to the law in question the court has aproached the consideration of the law with that deference which the courts must give to the action of the legislative department of the government and has endeavored to find a basis from which the law could be sustained as coming within recognized constitutional limitations. But the act gives to the purchaser of the lower berth the right to take property of the defendant for his personal convenience without compensation Such an act is not a

valid exercise either of the police power or of the reserve power to alter or amend the charter of the defendant.

The judgment, omitting title, reads as follows:

The above entitled action having been heard before the court without a jury, trial by jury having been duly waived, and the Court having made and filed its Findings of Fact and Conclusions of Law, and having therein ordered that judgment be entered for the defendant dismissing the plaintiff's complaint.

Now, therefore, on motion of C. H. Van Alstine and H. J. Killilea, attorneys for defendant, it is adjudged that the com-
102 plaint of the plaintiff be and the same is dismissed.

Dated July 12th, 1912.

NISSEN P. STENJEM, *Clerk.*

L. H. BANCROFT,
Attorney General;
RUSSELL JACKSON,
Deputy Attorney General,
Attorneys for Appellant.

103 STATE OF WISCONSIN:

Appeal from Circuit Court.

The judgment of the Supreme Court of Wisconsin is as follows.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby reversed with costs against the said respondent taxed at the sum of One Hundred Seventeen and 58-100 Dollars ($117.58.)

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to award plaintiff judgment for the amount of the penalty and for costs as indicated in opinion.

104 [Endorsed:] File No. 23,705. Supreme Court U. S. October term, 1913. Term No. 177. Chicago, Milwaukee & St. Paul Railway Company, Pl'ff in Error, vs. The State of Wisconsin. Assignment of errors and stipulation as to parts of record to be printed. Filed July 13, 1914.

2

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No. 177.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1914.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFF IN ERROR.

BURTON HANSON,
ATTORNEY FOR PLAINTIFF IN ERROR.

FRANK B. KELLOGG,
GUSTAVUS S. FERNALD,
OF COUNSEL.

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INDEX.

PAGE

I. STATEMENT OF THE CASE..... 2

II. SPECIFICATION OF ERRORS RELIED UPON 8

III. BRIEF OF ARGUMENT..... 11

(1) CHAPTER 272 OF THE 1911 LAWS OF WISCONSIN DEPRIVES PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES TO IT THE EQUAL PROTECTION OF THE LAWS IN TAKING ITS PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND IS THEREFORE IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.... 11

(2) CHAPTER 272 OF THE 1911 LAWS OF WISCONSIN IS A REGULATION OF COMMERCE AMONG THE STATES, AND IS VOID UNDER SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES 26

IV. APPENDIX 45

CASES CITED.

PAGE

Asbell v. *Kansas*, 209 U. S. 251..... 23
A. T. & S. F. Ry. v. *Mathews*, 174 U. S. 96..... 23
Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548..... 25
Atlantic Coast Line Ry. v. *Jones*, 63 Sou. (Ala.) 693.. 34
Baltimore & O. Rd. v. *Interstate Commerce Com'n.*, 221 U. S. 612.....34, 35
Barrett v. *New York*, 232 U. S. 14..... 38
Boyd v. *United States*, 116 U. S. 616..... 43
Chicago, Burlington & Quincy v. *Chicago*, 166 U. S. 226 22
C. R. I. & P. Ry. v. *Hardwick Elevator Co.*, 226 U. S. 426 .....28, 36, 40
City of Janesville v. *Carpenter*, 77 Wis. 288..... 21
Cleveland &c. Ry. v. *Illinois*, 177 U. S. 514..... 42
Covington Bridge Co. v. *Kentucky*, 154 U. S. 204.... 42
Davidson v. *New Orleans*, 96 U. S. 97.....21, 22
Dobbins v. *Los Angeles*, 195 U. S. 233..... 25
Gulf, Colorado & Santa Fe v. *Ellis*, 165 U. S. 150.... 23
Hall v. *De Cuir*, 95 U. S. 485.....28, 32, 40, 42
Holden v. *Hardy*, 169 U. S. 366..... 25
Houston, East & West Texas Ry. v. *U. S.*, 205 Fed. 391 31
Houston, East & West Texas Ry. &c. v. *U. S.*, 234 U. S. 342.....30, 31, 37
Illinois Central R. R. v. *Behrens*, 233 U. S. 473....34, 36
Johnson v. *Southern Pacific Co.*, 196 U. S. 1....28, 34, 35
Lake Shore, etc., Ry. Co. v. *Smith*, 173 U. S. 684.... 24
Lawton v. *Steele*, 152 U. S. 133.....17, 20, 25
Louisville & Nashville R. Co. v. *Eubank*, 184 U. S. 27. 30
Merchants & Miners Transportation Co. v. *Dixon*, 82 S. E. 141 (Ga.)..... 41
Minnesota Rate Cases, 230 U. S. 352..... 31

PAGE

Missouri Pacific Ry. v. *Nebraska*, 164 U. S. 403....12, 21
Mugler v. *Kansas*, 123 U. S. 623..... 23
Pullman Co. v. *Kansas*, 216 U. S. 56..... 37
Pullman Co. v. *Linke*, 203 Fed. 1017..... 28
Pumpelly v. *Green Bay*, 13 Wall. 166..... 22
Railroad Commission Cases, 116 U. S. 307..... 42
St. Louis, etc., Ry. Co. v. *Edwards*, 227 U. S. 265.... 40
Seaboard Air Line v. *Horton*, 233 U. S. 492..... 40
Searles v. *Mann Boudoir Car Co.*, 45 Fed. 330..... 22
Silz v. *Hesterberg*, 211 U. S. 31..... 25
Smith v. *State of Texas*, 233 U. S. 630..... 25
Southern Ry. Co. v. *United States*, 222 U. S. 20....
.....27, 28, 34, 35
Southern Ry. Co. v. *Reid*, 222 U. S. 424.....36, 40
State v. *C. M. & St. P. Ry.*, 136 Wis. 407..... 40
State v. *C. M. & St. P. Ry. Co.*, 152 Wis. 341.....8, 15, 27
State ex rel. N. P. Ry. Co. v. *R. R. Comm.*, 140 Wis. 145 6
State ex rel. McGrael v. *Phelps*, 144 Wis. 1.....16, 18
State v. *Redmon*, 134 Wis. 89.....5, 19
Texas & Pacific Ry. Co. v. *U. S.*, 205 Fed. 380..... 31
United States v. *Pere Marquette Ry.*, 211 Fed. 220.. 34
Water Power Cases, 148 Wis. 124..... 6
Welton v. *Missouri*, 91 U. S. 282..... 33
Western Union v. *Kansas*, 216 U. S. 1.....23, 37
Yick Wo v. *Hopkins*, 118 U. S. 356..... 23

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1914.

No. 177.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR PLAINTIFF IN ERROR.

Two questions are presented for decision:

1. Has a State the legal right to compel a railway company, which owns and operates sleeping cars, to give to the occupant of the lower berth, upon the payment of the prescribed charge for that berth, the space of the upper berth, if that berth is not occupied, without the payment of the prescribed charge for the upper berth?

2. Are the berths in a sleeping car employed in interstate commerce, which are not occupied by or sold to an intrastate passenger, subject to state regulation or control?

I. STATEMENT OF THE CASE.

The case comes to this court by writ of error to review the judgment of the Supreme Court of Wisconsin (152 Wis. 341) holding constitutional Chapter 272, Laws of Wisconsin, 1911, providing in substance that whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied. The suit was brought in the lower court to recover penalties for disobedience to the act and was heard on the complaint and answer, stipulation of facts and oral testimony. (See stipulation, Agreed Record page 8.) From the findings of fact by the lower court, the stipulation and testimony, the following facts appear:

The Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, owns and operates sleeping cars. Like the Pullman sleeping cars, which are in general use, the sleeping cars of the plaintiff in error are divided into sleeping car units, which units consist of lower berths, upper berths, sections, drawing rooms and compartments. The lower berths and upper berths are so constructed and arranged that when prepared for occupancy, each is separated from all other space in the car. A section includes both the lower and upper berth, and may be used as a lower and an upper berth, or as a lower berth with the upper berth closed and not used, thus giving the occupant the entire space of the section. The charge for the use of each unit of space, whether it be a lower berth or an upper berth, or a section, a com-

partment, or drawing room, is fixed and prescribed by tariffs which are promulgated, published and filed as required by the laws of the State of Wisconsin, and the laws of the other states in which the plaintiff in error operates sleeping cars, and by an act of Congress, popularly known as the Interstate Commerce Act, which rates of charge are the lawful rates which plaintiff in error is required to charge, and which the user of any such unit of sleeping car space is required to pay. The charge prescribed for the upper berth is twenty per cent less than the charge for the lower berth, and the charge for a section is the sum of the charges for both the lower and the upper berths.

On the 17th day of August, 1911, plaintiff in error was operating its sleeping car "Waubeno" between Chicago, in the State of Illinois, and Star Lake, Wisconsin. When this car reached Portage, Wisconsin, one Hall, having paid the tariff charge, $1.50, for lower berth No. 11 to Star Lake, Wisconsin, entered the car, and, finding that upper berth No. 11 was not engaged or occupied, demanded that the upper berth be closed so that he might have the use of the entire section. This demand was based on said Chapter 272, Laws of Wisconsin, 1911, printed in full in the appendix of this brief.

The demand was not complied with, and the State brought this action, in the Circuit Court of Dane County, Wisconsin, to recover $50, the amount of the forfeit for violating the provisions of the Act. The action was tried before the court, without a jury, and resulted in the following memorandum of Decision, Findings of Fact and Conclusions of law:

MEMORANDUM OF DECISION.

(Agreed Record, page 65.)

Whether Chapter 272 of the Laws of 1911 can be considered as an exercise of the police power or of the reserve power to alter or amend the charter of the defendant, its validity must be tested by the prescribed constitutional limitations which circumscribe legislative action.

The owners of sleeping cars have the same right to exact compensation for the use of the space occupied by the upper berth that they have to charge for the use of the lower berth. The right to use this space occupied by the upper berth and to charge others for the use of the same is their property and is protected by the same constitutional guaranties as any other private property.

The evidence establishes the fact that the opening of the upper berth is not dangerous to the lives, health or safety of the public or of such portion of the public as may occupy the lower berth. Giving the evidence the most favorable construction that it will bear, the closing of all upper berths in a sleeping car will not have sufficient effect on the general circulation of the air in the car to affect the health of persons occupying the lower berth. The closing of the upper berth does not affect society as a whole or that part of it which travels in sleeping cars, but is a convenience to the person occupying the lower berth and one that adds to his comfort alone. This is not sufficient to bring the act within the legitimate exercise of the police power on the ground that it is one promoting the comfort of society.

Counsel for the plaintiff suggests that the occupants of the lower berths may be considered as a class with whom the legislature may deal in exercising the police power. But the court has

found no legitimate basis upon which such a classification may be made.

As an exercise of the police power the act must bear the test of the constitutional limitations stated in *State* v. *Redmon*, 134 Wis. 89, 102-113. Indeed the law seems to be subject to the same objections on principle as those which led to the condemnation of the law there under consideration. If the situation in the sleeping car is such that the interests of the public generally require that the upper berths remain closed then such berths should be closed in all cases and their closing should not be made dependent on the chance of the upper berth being engaged or occupied.

In the Redmon case the law under consideration was condemned because the closing of the upper berth was left to the option of the occupant of the lower berth. In the case at bar the closing of the berth is determined by the fact that the upper berth is not engaged or occupied. The court concludes that Chapter 272 of the Laws of 1911 cannot be sustained as a valid exercise of the police power for reasons stated in *State* v. *Redmon*, 134 Wis. 89.

In considering Chapter 272 of the Laws of 1911 as an exercise of the power reserved to alter or amend the charter of the defendant, we must keep in mind the fact that the right to use and charge for the use of the space occupied by the upper berth is the property of the defendant and that it is protected by the same constitutional guarantees as any other private property.

"The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted. * * * The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over

corporations, and must be construed in connection with the other provisions of the constitution to the effect that private property shall not be taken for public use without compensation." *State ex rel. Northern Pac. Ry. Co.* v. *Railroad Commission*, 140 Wis. 145, 157-8. "It is to be construed like all constitutional provisions to harmonize with other commands and restrictions of the same instrument, and it must always yield to that paramount provision of the federal constitution which forbids the state to deprive any person of life, liberty or property without due process of law and to the substantial equivalent of the latter in our state constitution." *Water Power Cases*, 148 Wis. 124, 136.

In reaching its conclusion with reference to the law in question the court has approached the consideration of the law with that deference which the courts must give to the action of the legislative department of the government and has endeavored to find a basis upon which the law could be sustained as coming within recognized constitutional limitations. But the act gives to the purchaser of the lower berth the right to take property of the defendant for his personal convenience without compensation. Such an act is not a valid exercise either of the police power or of the reserve power to alter or amend the charter of the defendant.

FINDINGS OF FACT.

(Agreed Record, page 64.)

1. That on August 17, 1911, James T. Hall was a passenger from Portage, Wisconsin, to Star Lake, Wisconsin, on a sleeping car owned and operated by the defendant; that he engaged, paid for and occupied a lower berth on said sleeping car, that the upper berth of said section was not engaged or occupied; that he demanded that the upper berth of the said section remain closed, pursuant to the provisions of

Chapter 272, Laws of 1911; that defendant, acting through its agents and servants, refused to close the same, but left the same down through the entire night.

2. That the closing of upper berths in sleeping cars has very little effect upon the circulation of air in such sleeping cars when all lower berths are made up and ready for occupancy.

3. That the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths in sleeping cars.

4. That the closing of the upper berth will be a convenience to the person occupying the berth below the same and will add to the comfort of such person alone and not to that of the public generally.

5. That the defendant has a right to charge for the use of the space occupied by the upper berth and that such right is the property of the defendant.

CONCLUSIONS OF LAW.

(Agreed Record, page 64.)

1. That Chapter 272 of the Laws of 1911 is not a valid exercise of the police power.

2. That Chapter 272 of the Laws of 1911 is not a valid exercise of the reserve power to alter or amend the charter of the defendant.

3. That Chapter 272 of the laws of 1911 is void and of no effect, because it takes defendant's property without just compensation and without due process of law.

4. That judgment be entered dismissing plaintiff's complaint.

Let judgment be entered accordingly.

Dated July 8, 1912.

By the Court,

E. RAY STEVENS,
Judge.

An appeal was taken by the State to the Supreme

Court, and that court held the act valid, reversed the judgment of the Circuit Court, with directions to award the State the amount of the forfeiture and costs. *State* v. *Chicago, Milwaukee & St. Paul Railway Company,* 152 Wis. 341.

To review the judgment of the Supreme Court of Wisconsin, the case is brought to this court on writ of error.

II. SPECIFICATION OF ERRORS RELIED UPON.

(Agreed Record, page 1.)

I.

The court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin which declare that

> "Whenever a person shall engage and occupy a lower berth in a sleeping cars, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied,"

deprives plaintiff in error of liberty without due process of law and is void under the Fourteenth Amendment of the Constitution of the United States.

II.

The court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin, which declares that

> "Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time

be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied."

deprives plaintiff in error of its property without due process of law and is void under the Fourteenth Amendment to the Constitution of the United States.

III.

The court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin, which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied,"

denies to plaintiff in error the equal protection of the laws and is void under the Fourteenth Amendment to the Constitution of the United States.

IV.

The court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin, which declares that

"Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berths shall not be let down but shall remain closed until engaged or occupied,"

takes its property for public use without compensation and is void under the Fourteenth Amendment to the Constitution of the United States.

V.

The court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin, which declares that

> "Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied,"

is a regulation of commerce among the states and is void under Section 8 of Article 1 of the Constitution of the United States.

VI.

The court erred in refusing to hold that Chapter 272 of the 1911 Laws of Wisconsin, which declares that

> "Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied,"

is * in conflict with the Interstate Commerce Act and the action thereunder of the Interstate Commerce Commission and is therefore void.

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*In the printed record, the word *not* occurs between the words *is* and *in*. Counsel for both parties concede this to be a mistake, and that the assignment is correctly stated in this brief.

III. BRIEF OF ARGUMENT.

(1) CHAPTER 272 OF THE 1911 LAWS OF WISCONSIN DEPRIVES PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES TO IT THE EQUAL PROTECTION OF THE LAWS IN TAKING ITS PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND IS THEREFORE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Assignments I., II., III. and IV. may be considered together. They raise the question whether Chapter 272 of the 1911 Laws of Wisconsin deprives plaintiff in error of its property without due process of law or denies to it the equal protection of the laws, in violation of the Fourteenth Amendment. That upper berth No. 11 of the sleeping car "Waubeno," as well as the space allotted to it when lower berth No. 11 is occupied, is a unit of sleeping car space, for the use of which plaintiff in error is entitled to compensation, will not be denied. The statute in question acknowledges the right of plaintiff in error to sell the use of the upper berth separate and apart from the use of the lower berth; and it is a fact, admitted of record, that prior to the time this action arose, the Interstate Commerce Commission, pursuant to the power conferred upon it by the Interstate Commerce Act, after full hearing, made an order prescribing the rates to be charged for upper and lower berths in sleeping cars operated through the State of Wisconsin, and fixing the charge for the upper berth at eighty per cent of the charge for the lower berth. This statute and the order of the

Interstate Commerce Commission acknowledge the property right of plaintiff in error in the upper berths of its sleeping cars. Starting with the premise that the plaintiff in error has the same property right in the upper berths of its sleeping cars as it has in the lower berths, the State, under the guise of regulating sleeping car berths, proposes to take such of the upper berths as happen not to be engaged or occupied, and give them to the persons who engage and occupy the lower berths, thus giving to such persons the space and convenience of an entire section for the price of the lower berth only. The Supreme Court of Wisconsin, in sustaining the validity of this statute, held that so long as it permitted the upper berths to be occupied and used when any person desired them, plaintiff in error did not lose any revenue, and, therefore, was not deprived of its property without due process of law. This, in legal effect, amounts to a holding that when property is not in use, or while being held for use, the owner may be legally compelled to give the use of it to another without compensation. This is not tenable. A law which compels the owner of property to give the use of it to another without compensation, cannot be saved by the plea that no loss in dollars and cents will result to the owner and that such use will terminate as soon as the owner himself disposes of it. Such a law invades the rights secured to the owner of property by the Fourteenth Amendment. This has been so often decided by this court that citation of authorities is not necessary. (*Missouri Pacific Ry.* v. *Nebraska,* 164 U. S. 403, 417.)

The owner of the car having this property right in the car, and everything that pertains to it, and its

facilities for serving the public, has the right to keep and maintain the facilities in such condition as will best enable him to furnish them to the public when there is application therefor, and to devote them to the public use for hire. The upper berths cannot be occupied until prepared for occupancy, and to say that because the owner of the car has not been sufficiently fortunate to sell the use of the upper berths before the car starts, or before the car reaches the state line of Wisconsin, he may not keep and have the upper berths in position and prepared for occupancy so that he may sell the use thereof to an applicant, would be to deprive him of the right to have his property in the best condition to sell it for occupancy when the opportunity arises. In other words, that because he has not sold it, he *may not make it ready to sell* and have it in condition for immediate occupancy on application.

Let us suppose a not improbable situation, but on the contrary one that is quite likely to arise on any train carrying sleeping cars. Let us say the lower berths on a train are all sold for actual occupancy within the State of Wisconsin; that the train is due to reach a populous town where it customarily takes on passengers at a late hour at night; in pursuance of the statute involved in this case, the upper berths are all closed and are not ready for immediate occupancy. Ordinary precaution would dictate that some of the unoccupied berths in the car be made up into beds, ready for occupancy for prospective passengers to board the train at the town referred to. The owner of the car, however, may not, because of this statute, assume control of his own property, to-wit, the upper berths in the car, or any of them, and

make them ready for the patronage, state or interstate, which ordinarily and customarily he expects and gets on every trip, at the town which the train is approaching. It is necessary for the owner of the car to have the *use* of the upper berths in making them ready for occupancy, but that necessary *use* he is deprived of by reason of this statute. Can it be said that his rights secured by the Fourteenth Amendment are not invaded?

But it is claimed that, conceding there is an invasion of property rights, the State has not exceeded the legitimate bounds of police power in the enactment of this statute. The facts found by the trial court, after a full hearing, destroy this claim. As bearing upon this feature of the case, the facts are: (a) that the closing of upper berths has very little effect upon the circulation of air in the sleeping cars when all lower berths are made up and ready for occupancy; (b) that the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths; (c) that the closing of the upper berth will be a convenience to the person occupying the berth below the same and will add to the comfort of such person alone, and not to that of the public generally. It further appears by the testimony that it is entirely impracticable, after passengers in the lower berths have retired to rest, to make up the upper berths as they may be called for from time to time during the night. The disturbance of the passengers by reason of the noise; the fact that the porter must necessarily reach inside the curtains of the lower berth in order to fasten down the upper berth (which is particularly objectionable in the case of lady passengers), and the delay incident to

making up the berths, all render it of importance that the company should be at liberty to have complete control over the upper berths remaining unsold. (Agreed Record, page 11.)

From these facts it clearly appears that the design of the statute was not to promote the health, comfort or convenience of the occupants of sleeping cars generally, for it is quite obvious that compliance with the statute will subserve the comfort and convenience of only such occupants of lower berths as chance to be fortunate enough to select, or have assigned to them, lower berths of sections whose upper berths are unoccupied. It thus appears that the statute embraces but a particular class, and not the occupants of sleeping cars generally. A law which makes provision for the comfort and convenience of only a portion of the same class—occupants of sleeping cars—is not a reasonable exercise of the police or governing power of the state. Its object is not legitimate. It is unduly oppressive, in that it imposes unusual and unnecessary restrictions upon a lawful business that is conducted in accordance with a custom which prevails the world over, and as the trial court found, does not endanger the lives, health or safety of persons using sleeping cars, or interfere with the comfort or convenience of the occupants of sleeping cars generally.

The Supreme Court of Wisconsin said, in deciding this case, 152 Wis. 341:

> "If we find the law promotive of the comfort and convenience of the public, and that it applies to every one who may apply for the service, then it is a general law, designed to contribute to the general welfare of all the people."

The same court in *State ex rel. McGrael* v. *Phelps*, 144 Wis. 1, 18, said:

> "In the exercise of police power, two questions are involved. First. Is the purpose legitimate? Second. Are the means employed to effect the purpose legitimate? If the former be legitimate and the latter reasonably adapted to effect the former, the law is entitled to judicial approval; otherwise not."

As considered by the Supreme Court of Wisconsin, the first essential of the police power, then, relates to the purpose; in the act here involved the purpose and subject is, ostensibly at least, health or welfare. It will not be questioned that health or welfare are legitimate subjects of legislation, but it does not follow that because the legislature has the undoubted power to legislate concerning health that all of its enactments, however drastic, or however ineffectual to accomplish the professed object, or however and to what extent they may interfere with property rights while not accomplishing the professed object, must stand as the law of the state and be enforced by judicial approval.

Let us now look to the second essential which the Supreme Court of Wisconsin has defined, namely, are the means employed to effect the purpose legitimate, bearing in mind that the state supreme court has held that *both* the purpose and the means employed to effect the purpose must be legitimate, and also that the means be reasonably adapted to effect the purpose, otherwise the law will not receive judicial approval.

If the customary use of upper berths in sleeping cars affects injuriously the health of occupants of lower berths, or materially interferes with their com-

fort or convenience (which is not the case, as the findings of fact show), the state, if it legislates at all on this subject, should prohibit the use of upper berths, and allow the owners of sleeping cars to recoup their loss by exacting higher rates for the use of lower berths. But the findings of fact in this case, the fact that the Interstate Commerce Commission, which is clothed with power to regulate sleeping cars employed in interstate commerce, while fixing the rate of charge for upper berths, has taken no action regulating or prohibiting their use, and the custom which has prevailed in this country ever since sleeping cars have been in use, show conclusively that the object of the Wisconsin statute is not legitimate, that the means provided are not reasonably adapted to effect the purpose, and that the attempted exercise of police power is an arbitrary interference with the right of owners of sleeping cars to conduct their business in a proper way, and to receive the lawful compensation prescribed therefor.

This court, in *Lawton* v. *Steele,* 152 U. S. 133, said, on page 137:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that *the means are reasonably necessary for the accomplishment of the purpose,* and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations." (Italics ours.)

There is no substantial difference between the rule as laid down by this court in the Lawton case (152

U. S. 133) and the rule laid down by the Supreme Court of Wisconsin in the McGrael case (144 Wis. 1, 18). In deciding the present case, the Supreme Court of Wisconsin apparently did not intend to overrule the principles laid down by it in the McGrael case, and in order not to do so, they must of necessity have held the means, that is, the statute here involved, to be reasonably adapted to effect the purpose, and that conclusion they reached by means of the reasoning that the law is general and applies to every one who may apply for the service, but in this reasoning the learned Wisconsin Supreme Court overlooks, we think, two potential factors, one of fact, the other of law. They overlook the finding of the trial court of the fact:

> "3. That the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths in sleeping cars." (Agreed Record, page 64.)

That finding of fact was not questioned by the State Supreme Court, although somewhat criticised; it is, therefore, conclusive on the court in this case and is conclusive that the act is not a means reasonably adapted to effect the purpose of protecting either the health or safety of the occupants of any portion of the car. The only other object or purpose left is that of convenience, and we think no court has ever held that mere convenience, even of *all the public,* would justify the state in so interfering with and preventing the free use of property by its owner for any lawful purpose.

The Supreme Court of Wisconsin held the first law passed by the legislature of that state unconstitutional. The only difference in principle between

the two laws is that under the first law it was left optional with the passenger occupying the lower berth whether the upper berth (in case the same was unoccupied) should remain closed, while in the present law under such conditions it is to remain closed irrespective of the wishes of the passenger occupying the lower berth. The court held the first law unconstitutional in a very able opinion by Justice Marshall (*State* v. *Redmon*, 134 Wis. 89), in which it was held that it is not sufficient for the law to be merely promotive of comfort and public convenience, but it must be necessary to that object. The court said:

> "The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power. Not that a police regulation, in form or pretense, to be one in fact must supply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto, as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter."

It is obvious that not every enactment which would conduce to the comfort of individuals is within the police power. Undoubtedly, it would promote the comfort and health of a large class of the community to appropriate the property of another class in order to furnish better clothing, housing, sanitation and conveniences of life. But, under the Constitution, property cannot be taken for this purpose. It

is only where there is a controlling necessity for the protection of life, health and comfort of the community that such laws can be maintained.

The other point—the question of law—is based on the principle declared by this court in *Lawton* v. *Steele,* 152 U. S. 137, where this court said it must appear that the means are "not unduly oppressive upon individuals." And that "the legislature may not, under the guise of protecting the public interests arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations." It seems perfectly plain that when the state so restricts the use of the upper berth by the owner that he may not, in pursuance of the lawful occupation of furnishing it to passengers, enter in and upon it and prepare it for occupancy previous to actual requirement therefor, but which he may reasonably anticipate, his private business is arbitrarly interfered with.

The Supreme Court of Wisconsin disposes of this by saying:

> "The law permits the berths to be occupied and used when any person desires them;"

but it is clear that this does not meet the question of the owner's right to so handle his property, which is for rent, as to have it ready for immediate letting when some passenger may desire to use it. There is an actual, complete and immediate deprivation of his property and the use of it for the time being and he would by this statute be prevented from making it ready for immediate occupancy.

The Supreme Court of Wisconsin has said:

> "Any restriction or interruption of the common and necessary use of property that de-

stroys its value, *or strips it of its attributes,* or to say that the owner shall not use his property as he pleases takes it in violation of the constitution." (Italics ours.)

City of Janesville v. *Carpenter,* 77 Wis. 288, 291.

Under the statute of Wisconsin the deprivation is not, of course, permanent, but while it lasts it is complete and restricts the free use by the owner.

This court has many times spoken on such interference with the use of property. In *Missouri Pacific Railway* v. *Nebraska,* 164 U. S. 403, 417, this court said:

"To require the railroad company to grant to the petitioners a location on its right of way for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit. *without reserving any control of the use of such land,* or of the building to be erected thereon, to the railroad company for the accommodation of *its own business,* or for the convenience of the public." (Italics ours.)

In *Davidson* v. *New Orleans,* 96 U. S. 97, 102, the court said:

"It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."

In *Pumpelly* v. *Green Bay*, 13 Wallace 166, 177-8, this court held that a construction of constitutional law which would permit interference with property but did not go to the extent of *actually taking it* for public use, would convert the constitutional provision into a restriction upon the rights of the citizen and make it an authority for invasion of private right under the pretext of public good, and in *Chicago, Burlington & Quincy* v. *Chicago*, 166 U. S. 226, 235, this court, in commenting upon *Davidson* v. *New Orleans*, 96 U. S. 97, said:

> "It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation."

James C. Hall, the passenger named in the complaint in this action, who purchased the lower berth, might, regardless of the statute here involved, have obtained the use of the upper berth and right to have it open or closed as he chose upon payment of $1.20. His right to do that is unquestioned.

Searles v. *Mann Boudoir Car Co.*, 45 Fed. 330.

The statute, however, attempts to compel the furnishing of the upper berth in the section and to compel the plaintiff in error to give him the use of the upper berth and the right to control it, depriving the plaintiff in error of the control of its property during that time, and also depriving plaintiff in error of the tariff rate for the use thereof, which, but for the statute, it would receive if it furnished said Hall the additional comfort and convenience of the use and control of the upper berth.

The legislature, in enacting the law in question,

attempted to save it as an exercise of the police power by giving it the name of a health regulation, but when such an enactment involves a question of invasion of constitutional rights, the courts will examine for themselves to determine whether the statute is a proper exercise of the power or whether under a guise it violates the constitution. (*Asbell* v. *Kansas*, 209 U. S. 251, 256.) And in *Mugler* v. *Kansas*, 123 U. S. 623, 661, it was said:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

This court is not concluded by the opinion of the Supreme Court of the state, but will examine and determine for itself whether the enactment does violate the federal constitution or invade the federal domain.

Yick Wo v. *Hopkins*, 118 U. S. 356, 366.
Gulf, Colorado & Santa Fe v. *Ellis*, 165 U. S. 150.
A. T. & S. F. v. *Matthews*, 174 U. S. 96.
Western Union v. *Kansas*, 216 U. S. 1, 27.

The record shows that under the rules prescribed and promulgated in the tariffs of plaintiff in error, filed with the Commission, Mr. Hall could, if he had desired the comfort and convenience which the space of the upper berth in conjunction with the lower berth affords, have secured the same by the payment of the lawful charge prescribed therefor. This priv-

ilege, under the rules so prescribed and promulgated, is open to all alike. While it may be convenient for the occupant of the lower berth to have the use of the upper berth, when that berth is not otherwise engaged, such convenience is necessarily confined to a small portion only of persons who travel in sleeping cars, and therefore is not a convenience which the legislature is required to protect or can lawfully protect. The power of the legislature to enact general laws regarding the use of sleeping car berths, does not include the power to compel the owners of such cars to make an exception in favor of a particular class, and to give that class more conveniences than they give to the occupants of sleeping cars generally, and to charge a less sum than they charge those who are not fortunate enough to be within that class. *Lake Shore, etc., Ry. Co.* v. *Smith,* 173 U. S. 684. In that case a law of the State of Michigan providing that 1,000 mile tickets for $20 should be issued to the purchaser, his wife and children, should run for a period of two years, and that the company should redeem any unused portion thereof, was held to be an unwarranted interference with the railway company's right to do business and a discrimination in favor of a class of individuals and void within the Fourteenth Amendment. The court said, page 691:

> "It thus invades the general right of a company to conduct and manage its own affairs and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law."

To paraphrase the language used by Mr. Justice Peckham in the Smith case, the statute in question is a pure, bald and unmixed example of discrimination in favor of a few persons having occasion to travel in sleeping cars, permitting them more conveniences at the same expense, or the same conveniences at less expense than others are subjected to.

In *Silz* v. *Hesterberg,* 211 U. S. 31, 39, the court said:

> "That the legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court. *Lawton* v. *Steele,* 152 U. S. 133, 137; *Holden* v. *Hardy,* 169 U. S. 366; *Dobbins* v. *Los Angeles,* 195 U. S. 233, 236."

And in *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 559, the court said:

> "Of course if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power."

In the recent case of *Smith* v. *State of Texas,* 233 U. S. 630, decided by this court May 11, 1914, opinion by Mr. Justice Lamar, the Texas statute prohibited

any person acting as a conductor on a railway train without having two years prior experience as a brakeman or a conductor of a freight train. The court held that the statute was unconstitutional in that it unlawfully interfered with private business and imposed unusual and unnecessary restrictions upon a lawful occupation, depriving the public of the right to secure employment as conductors and amounting (as to persons competent to fill such a position but lacking the specified qualification) to a denial of the equal protection of the law. The test was in fact an arbitrary one and operated to deprive persons of the right to labor in the face of the constitutional guarantee that the citizen shall be protected in the right to pursue any lawful calling. This decision fully sustains the claim that the statute here involved is unreasonable, arbitrary and exclusive, that it unduly and unreasonably restricts the constitutional rights of plaintiff in error, and is violative of the federal constitution.

II.

CHAPTER 272 OF THE 1911 LAWS OF WISCONSIN IS A REGULATION OF COMMERCE AMONG THE STATES, AND IS VOID UNDER SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

The remaining assignments of error, V. and VI., may likewise be considered together. They present the question whether the statute, if otherwise valid, is valid as applied to sleeping cars employed in interstate commerce. The sleeping car in question was operated over a route extending between the

City of Chicago, State of Illinois, and Star Lake, State of Wisconsin. It carried both intrastate and interstate passengers. This commingling of the two classes of passengers is an economic necessity. (*Southern Ry. Co.* v. *United States,* 222 U. S. 20, 27.) Prior to the enactment of this statute, the Interstate Commerce Commission had, after a full hearing, as provided in the Interstate Commerce Act, made an order prescribing rates of charges for lower and upper berths in sleeping cars operating over the route used by the "Waubeno," the sleeping car in question. No order has ever been made by the Commission that in any way affects or prohibits the use of upper berths while the lower berths are occupied. So far as any action taken by the Interstate Commerce Commission affecting or regulating the use of upper berths in sleeping cars is concerned, plaintiff in error is left free to conduct its business in accordance with the custom which has prevailed throughout the United States ever since sleeping cars have been in use. The state claims, and its Supreme Court has sustained the claim (*State* v. *C. M. & St. P. Ry. Co.,* 152 Wis. 341), that the sleeping berths of the car in question, *when occupied,* by intrastate passengers, are subject to its regulatory power. But that is not the question in this case. The statute in question relates to berths *not occupied,* but held for sale and occupancy.

Congress has by the enactment of the Interstate Commerce Act (Section 1) assumed jurisdiction of sleeping car companies. The term "transportation" as used in that section of the act, includes cars and other vehicles, and all instrumentalities and facilities of carriage, irrespective of ownership. The

sleeping car in question was owned and operated by the plaintiff in error in interstate commerce, and the car and sleeping compartments or berths were instrumentalities and facilities of carriage, and as such subject to the provisions of that act.

Congress having so entered the field of sleeping car regulation, and by the amendment of 1906 (34 Stat. 584, Sec. 1) having assumed control thereof in interstate transportation; having defined vehicles of the sleeping car business as "transportation," it assumed complete control over the sleeping car "Waubeno" whenever it should be employed in interstate commerce, and the car itself being on the trip in question interstate "transportation," was under the exclusive control of Congress.

Johnson v. *Southern Pacific Co.*, 196 U. S. 1, 22.

Hall v. *De Cuir*, 95 U. S. 485.

C. R. I. & P. Ry. v. *Hardwick Elevator Co.*, 226 U. S. 426, 433-435.

Pullman Co. v. *Linke*, 203 Fed. 1017.

While it is permitted to carry intrastate passengers in vehicles employed in interstate commerce (*Southern Ry.* v. *United States*, 222 U. S. 20, 27), for reasons of convenience to the public and as an economic necessity, federal authority is supreme with respect to vehicles so employed, and the states may not by arbitrary enactment compel discrimination by the carrier in the character or arrangement of the vehicle while within a particular state any more than the states could compel the carrier to discriminate against an interstate passenger in the matter of rates for carriage, which Congress has plainly and expressly forbidden.

Section 3 of the Act to Regulate Commerce provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

If the provisions of the Wisconsin statute had been in force with respect to Hall named in the complaint, he would have obtained the use of an entire section, an upper and a lower berth, between Portage, Wisconsin, and Star Lake, Wisconsin, on payment of the lower berth rate alone. An interstate passenger from Chicago, Illinois, to Star Lake, Wisconsin (between which points the car ran), who purchased a lower berth would pay the interstate rate for such accommodation between those points, and would be entitled under the Act to Regulate Commerce to a lower berth *only*. It must be perfectly apparent that in those circumstances the plaintiff in error would have discriminated between the plaintiff Hall, an intrastate passenger, and the interstate passenger between Chicago and Star Lake, in violation of Section 3 of the Act to Regulate Commerce which we have just quoted.

The regulation of interstate carriers provided for by the Act to Regulate Commerce and the prohibition of discrimination extends to other things than transportation rates. The subject

of investigation by the Interstate Commerce Commission under Section 15 of the Act to Regulate Commerce, as amended provides for an investigation, either upon complaint or upon the initiative of the Commission, with respect to rates and charges and *to any regulation or practice whatsoever* of a carrier subject to the provisions of the act, and provides that if the Commission find that such regulations or practices are unjust or unreasonable or prejudicial or otherwise in violation of any of the provisions of the act, then the Commission is empowered to determine and prescribe what regulation or practice is reasonable and shall be thereafter followed. (As amended June 18, 1910. 36 Stat. 539, 551.)

A regulation or practice which is a discrimination against an interstate traveler and in favor of an intrastate traveler within a state is equally forbidden by the Act to Regulate Commerce as would be and is discrimination between two interstate travelers. That was the underlying principle in the decision of *Louisville & Nashville Rd. Co.* v. *Eubank,* 184 U. S. 27.

In *Houston, East & West Texas Ry., etc.,* v. *United States* (the Shreveport case, decided June 8, 1914), 234 U. S. 342, this court said, page 353, regarding this principle:

> "We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the ac-

tion of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."

The proviso in the first section of the Act to Regulate Commerce, as amended June 29, 1906 (34 Stat. 584), that the act shall not apply to transportation "wholly within one state," does not exempt the carrier from the prohibition of discrimination in the relation of intrastate and interstate rates or practices to each other.

The Minnesota Rate Cases, 230 U. S. 352, 419.

Houston, East & West Taxes Ry., etc., v. *United States,* 234 U. S. 342 (the Shreveport Case).

See also the reports of the two Shreveport Cases in the Commerce Court—

Texas & P. Ry. Co. v. *United States,* 205 Fed. 380.

Houston, East & West Texas Ry. v. *United States,* 205 Fed. 391.

This court passed upon a statute of similar character to the Wisconsin one, and held it invalid in

Hall v. *De Cuir*, 95 U. S. 485, a decision so well known and so often referred to by this court in its opinions ever since that decision was rendered, that we refrain from even making a statement of the case, but call attention to certain forcible expressions of the court which apply to the case at bar. The court, through Chief Justice Waite, in declaring the act unconstitutional, used this language in part (pp. 488, 489):

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. * * *
>
> If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property

brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. * * *

Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. * * * As was said by Mr. Justice Field, speaking for the court in *Welton* v. *State of Missouri*, 91 U. S. 282, 'inaction (by Congress) * * * is equivalent to a declaration that interstate commerce shall remain free and untrammeled.' Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, *it must come from Congress and not from the states.*" (Italics ours.)

The regulations made and observed by the proprietors of sleeping cars throughout the country with the acquiescence of Congress as to the arrangement and use by passengers of both upper and lower

berths in their cars show not only that the subject admits of a uniform regulation between the states, but that the obvious demands of public travel require such uniformity and regulation for the convenience and comfort of travel and to avoid conflicting regulations between states which might be unbearable both to the proprietors of such cars and to those who occupy the sleeping accommodations therein, and hence an unwarranted hindrance to and burden upon interstate commerce.

It is a fact admitted in this case by the allegations of the answer and the stipulation of the parties that the commingling of state and interstate passengers is necessary to the economical rendering of sleeping car service, and the intrastate sleeping car passengers are carried principally in cars running interstate.

The fact that some portions of an interstate vehicle—certain specific apartments or sleeping berths in a sleeping car—are, for convenience and economy in rendering the service, devoted to the accommodation of intrastate passengers does not preclude the exercise of federal power over the vehicle, *and exclusively* over all portions of the vehicle not at the time devoted *to* the service of an intrastate passenger.

Baltimore & O. Rd. v. *Interstate Commerce Commission*, 221 U. S. 612, 618.

Southern Ry. v. *U. S.*, 222 U. S. 20, 26, 27.

Illinois Central Rd. v. *Behrens*, 233 U. S. 473, 477.

Atlantic Coast Line Ry. v. *Jones* (Ala.), 63 So. 693.

U. S. v. *Pere Marquette Ry.*, 211 Fed. 220.

Johnson v. *Southern Pacific Co.*, 196 U. S. 1, 21, 22.

In the case of *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, the court held that a dining car which had finished its interstate journey and was lying on a sidetrack at a terminus was as much an instrumentality of interstate commerce as though actually moving in a train.

In the case of *Southern Ry. Co.* v. *United States*, 222 U. S. 20, the court held that the safety appliance law applied "to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce" whether the particular car was carrying interstate traffic or being moved in interstate commerce. In other words, that where cars are commingled the Congress had jurisdiction over the railroad and all of the appliances or instrumentalities of interstate commerce. That is this case. The Congress has conferred jurisdiction on the Commission and the Commission has exercised that jurisdiction in regulating the price of the berths in the car moving in interstate commerce and this car was an instrumentality of such commerce. The moment the car passed the state line it did not cease to be an instrumentaltiy of interstate commerce. To be sure, if it carried intrastate passengers, in the absence of action by Congress, that intrastate passenger's fare might be regulated by the state, but the balance of the car not given up to the local passenger still remains an instrumentality in interstate commerce.

In the case of *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, the court held the Employers' Liability Act valid although the employe may also have been engaged in

intrastate transportation. In other words, where the cars and other instrumentalities for the movement of freight are commingled the power of Congress is exclusive over the employe if engaged in the movement of these instrumentalities in interstate commerce.

In *Illinois Central Railroad Co.* v. *Behrens,* 233 U. S. 473, this court said (page 477):

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the independence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolyatedly considered, was in interstate or intrastate commerce."

In the case of the *Chicago, Rock Island & Pac. Ry. Co.* v. *Hardwick Elevator Co.,* 226 U. S. 426, it was held that the statute of Minnesota requiring a railroad company to furnish cars at an elevator within a definite number of hours after notice was unconstitutional, as applied to cars which were intended to be loaded with grain to be shipped in interstate commerce; that the car which was intended to be used in interstate commerce was an instrumentality of such commerce, over which Congress had exclusive jurisdiction.

In *Southern Ry. Co.* v. *Reid,* 222 U. S. 424, this court held that Congress had taken possession of the subject of regulation of interstate transporta-

tion, and that transportation means not only the physical instrumentalities but all service in connection therewith. Opinion, pages 440-442.

In *Houston, East & West Texas Ry.* v. *United States,* 234 U. S. 342, on page 351, the court said:

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field."

Now, were the proprietor of the car to be prohibited from doing an intrastate sleeping car business unless he complied with the provisions of Section 1 of the Wisconsin Act, can it be doubted for a moment that interstate commerce would be affected, would be burdened and regulated, as was held in *Western Union* v. *Kansas,* 216 U. S. 1, and *Pullman* v. *Kansas,* 216 U. S. 56, where it was held that a statutory requirement that a foreign corporation, as a condition of its right to engage in local business in Kansas, should first pay a given per cent. of its authorized capital representing its property and business everywhere, was a burden on the company's interstate commerce and its privilege to engage in that commerce. In the latter of those cases Mr. Justice White, in his concurring opinion, plainly drew the distinction between a case where the power of the state to exclude or prohibit was absolute and a case where the power was relative, as in the case of the corporation engaged both in interstate and

intrastate commerce with the same instrumentalities. Mr. Justice White said (page 68):

> "Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce. * * * This follows, since the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business."

See also, *Barrett* v. *New York*, 232 U. S. 14, where the City of New York imposed a license as a condition precedent to conducting an express business within the municipality. Mr. Justice Hughes, in delivering the opinion, said of the method by which the company did business (page 29):

> "* * * it being impracticable to effect a separation, the local and the other intrastate shipments are handled in the same vehicles, and by the same men, that are employed in connection with the interstate transportation."

and decided that the imposition of the license was invalid as an interference with interstate commerce, if applicable to commerce of that nature. The justice further said, on page 31:

> "It is insisted that, under the authority of the State, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally

> to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. * * * It must, however, be confined to matters which are appropriately of local concern. * * * Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license."

The difference between the present act and an act which would prohibit the proprietor from doing business, unless he complied with such requirements as the present act contains, would be a difference in degree only; the principle of the power exerted by the state would be the same. In one case it would prohibit the doing of intrastate business; in the present case it prohibits the doing of business within the state in an *interstate car except in the method prescribed by the state statute,* and is a prohibition against earning the revenue which the proprietor has the lawful right to collect for the use of the facilities in a car which is employed in interstate commerce and no part of which is devoted to intrastate commerce, except such berths as may be sold to intrastate passengers. Where then is the difference in the principle—in the nature of the burden and regulation of interstate commerce?

If the state has the right to enter a car so employed, and direct the arrangement of the sleeping car berths in the manner contemplated by the Wisconsin Act, then jurisdiction over the internal management of the car is "split up," resulting in one set of conveniences for intrastate passengers and another set for interstate passengers, a situation

which the grant of exclusive power to Congress to regulate commerce (which includes facilities used therein) among the states was designed to prevent. The doctrine is elementary and long settled that there can be no divided authority over interstate commerce, or the facilities or instrumentalities employed therein, and that when Congress has once entered the field, its regulations are supreme. And although Congress, in exercising its regulatory power, stops short of the power exercised by the state, yet having entered the field, its action is deemed an assertion of the Federal power over the entire subject, and amounts to a declaration that as to matters not in terms regulated, they shall be treated in accordance with the prevailing custom.

Hall v. *De Cuir*, 95 U. S. 485.

State v. *C. M. & St. P. Ry.*, 136 Wis. 407.

Chicago, Rock Island & Pac. Ry. v. *Hardwick Elevator Co.*, 226 U. S. 426.

Southern Ry. Co. v. *Reid*, 222 U. S. 424.

St. Louis etc., Ry. Co. v. *Edwards*, 227 U. S. 265.

Seaboard Air Line v. *Horton*, 233 U. S. 492.

But this statute of Wisconsin goes far beyond directing the arrangement of berths *occupied* by intrastate passengers. It undertakes to control and direct the arrangement of portions of an interstate car *not occupied at all—portions which have not been devoted to intrastate purposes, but which remain interstate facilities in an interstate car* until devoted to the use of an intrastate passenger—portions to which no one except the owner has acquired the right to either occupy or control. If, as in the present case,

the car is employed in making an interstate trip, carrying interstate passengers, it is under the exclusive control and regulation of Congress. If no berths had been sold to intrastate passengers, it must be conceded that the Wisconsin statute would not have applied to the car "Waubeno," but that the car would have remained entirely interstate during its whole trip. If it be conceded, which it is not, that the state may control or regulate the vehicle or its facilities to any extent whatever as to the matters contemplated, such control or regulation must in any event be limited to such portions of the car as are devoted to intrastate passengers, *i. e.*, those taken up for a passage wholly within the state. It could not extend to any portion of an interstate vehicle not actually devoted to and used for intrastate traffic. It could no more extend to the unsold and unoccupied berth and the space thereof in the interstate car than to a berth or compartment occupied by an interstate passenger.

In *Merchants' & Miners' Transp. Co.* v. *Dixon*, 82 S. E. 141 (Ga.), the Railway Commission of Georgia attempted by an order to regulate the proportion of space in ships belonging to the transportation company devoted to offerings of lumber for shipments at the ports of Jacksonville and Savannah. The object of the regulation was to require the company to reserve a due proportion of space for the use of the Savannah shippers. The court, however, held that such an order was invalid as a regulation of interstate commerce. The court, on page 144, said:

> "* * * the order is in substance and effect a regulation of commerce between ports being in different states. It cannot be said in defense

of the order that it only incidentally affects commerce between such ports. One of the plain purposes of that paragraph of the order under consideration is to require of the defendant company 'a due proportion of space' to the shippers of lumber at Savannah, 'taking into consideration the lumber shipments at any given time at Jacksonville and at Savannah, respectively,' and 'as to the proportionate space which may be set apart under any allotment thus taking into consideration the lumber ready for shipment at the two ports respectively, the defendant is enjoined from permitting lumber at Jacksonville to occupy space which, but for such occupancy, would be available to shipments tendered by the plaintiff, although prior tenders at Jacksonville may be sufficient to take the entire space for the sailing.'"

See, also:

Hall v. *De Cuir*, 95 U. S. 485.

It may be claimed that the car "Waubeno" on the trip in question would not again leave the state until its return trip, but that is immaterial. The statutory regulation would apply, if at all, on the return trip—Star Lake to Chicago—as well, and to all sleeping cars of the plaintiff in error while in the state. The unsold upper berths are equally liable to be required for interstate as for intrastate occupancy. This court has held that nothing can be done by the state which will operate as a burden on the interstate business of the company or *impair the usefulness* of its facilities for interstate traffic.

Railroad Commission Cases, 116 U. S. 307, 334.

Covington Bridge Co. v. *Kentucky*, 154 U. S. 204, 215.

Cleveland, etc., Ry. v. *Illinois*, 177 U. S. 514, 522, 523.

The Supreme Court of the United States in *Boyd* v. *United States*, 116 U. S. 616, 635, sounded a warning against stealthy encroachments upon the constitutional provisions for the security of person and property. The court said:

> "* * * illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Respectfully submitted,

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General Counsel Chicago, Milwaukee & St. Paul Railway Co.

FRANK B. KELLOGG,
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Of Counsel.

IV. APPENDIX.

WISCONSIN SESSION LAWS, 1911.

No. 160, A.) (Published June 8, 1911.

CHAPTER 272.

AN ACT to repeal section 1636p of the statutes, and to create a new section to be designated as section 1636p, relating to sleeping-car berths.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section 1636p of the statutes is repealed.

SECTION 2. There is added to the statutes a new section to be designated and read: Section 1636p. 1. Whenever a person shall engage and occupy a lower berth in a sleeping-car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied.

2. Any corporation which requires, permits or suffers any porter, conductor or other person to violate any provisions of this section shall forfeit a sum not less than fifty nor more than one hundred dollars, to be collected as provided by the statutes for the collection of forfeitures.

3. Any porter, conductor or other person in charge of or employed in any sleeping-car, who shall violate any provision of this act shall be deemed

guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding six months.

(Am. 1911, c. 664, s. 38.)

SECTION 3. This act shall take effect and be in force from and after its passage and publication.

Approved June 7, 1911.

3

Office Supreme Court, U. S.
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No. 177

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1914.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

N ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF FOR PLAINTIFF IN ERROR.

BURTON HANSON,
ATTORNEY FOR PLAINTIFF IN ERROR.

RANK B. KELLOGG,
USTAVUS S. FERNALD,
OF COUNSEL.

THE PIONEER COMPANY, ST. PAUL

INDEX.

PAGE

1. REPLY TO PART II OF THE ARGUMENT OF THE DEFENDANT IN ERROR: "THE WISCONSIN UPPER BERTH LAW (CHAP. 272, LAWS OF 1911) IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE ON BEHALF OF THE PULIC HEALTH AND WELFARE" 1

2. REPLY TO PART IV OF THE ARGUMENT OF THE DEFENDANT IN ERROR: "THE WISCONSIN UPPER BERTH LAW IS NOT UNCONSTITUTIONAL AS A REGULATION OF INTERSTATE COMMERCE UNDER SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES" 8

3. REPLY TO PART V OF THE ARGUMENT OF THE DEFENDANT IN ERROR: "THE WISCONSIN UPPER BERTH LAW IS A VALID EXERCISE OF THE POWER RESERVED TO THE STATE LEGISLATURE BY SECTION 1 OF ARTICLE XI OF THE STATE CONSTITUTION TO ALTER THE CORPORATE FRANCHISE OF THE PLAINTIFF IN ERROR" 19

CASES CITED.

PAGE

Adirondack Ry. v. *State of New York,* 176 U. S. 335 24
Albany, Etc. Ry. v. *Brownell,* 24 N. Y. 345 .. 27
C. R. I. & P. Ry. v. *Hardwick Elevator Co.,* 226 U. S. 426 14
Commonwealth v. *Essex County,* 13 Gray (Mass.) 239 26
Coppage v. *Kansas,* U. S. Supreme Court, Decided January 25, 1915 4
Crease v. *Babcock,* 23 Pick. 334 26
Del., Lack. & W. Rd. v. *Board of Pub. Util. Comm.,* 88 Atl. (N. J.) 849 .....5, 28
Duluth & Iron Range Rd. v. *St. Louis County,* 179 U. S. 302 24
Detroit v. *Detroit & Howell P. R. Co.,* 43 Mich. 140 27
Hocking Valley Ry. v. *United States,* 210 Fed. 735 12
Hall v. *DeCuir,* 95 U. S. 485 16
Holyoke Co. v. *Lyman,* 15 Wall. 500 21
Ives v. *South Buffalo Ry. Co.,* 94 N. E. (N. Y.) 431 30
Louisville Water Co. v. *Clark,* 143 U. S. 1 .. 22
Missouri Pac. Ry. v. *Larabee Mills,* 211 U. S. 612 12
Miller v. *State,* 15 Wall. 478 21
Milwaukee Elec. Ry. & Light Co. v. *Railroad Comm.,* 142 N. W. (Wis.) 491 26
Pearsall v. *Great Northern Ry.,* 161 U. S. 646 24

PAGE
Railroad Co. v. *Maine*, 96 U. S. 499..... 27
Shields v. *Ohio*, 95 U. S. 319..... 21
Sinking Fund Cases, 99 U. S. 710.....22, 27
South Covington & Cincinnati St. Ry. Co. v. *City of Covington, et al.*, U. S. Supreme Court, Decided January 5, 1915....6, 15, 18
Stearns v. *Minnesota*, 179 U. S. 223..... 22
Stanislaus County v. *San Joaquin C. & I. Co.*, 192 U. S. 201..... 23
San Joaquin C. & I. Co. v. *Stanislaus County*, 113 Fed. 930..... 24
State ex rel. Nor. Pac. Rd. v. *Railroad Commission*, 140 Wis. 145..... 24
State v. *Northern Pac. Rd.*, 147 N. W. (Wis.) 219 26
Venner v. *Chicago Ry. Co.*, 92 N. E. (Ill.) 643 30
Water Power Cases, 148 Wis. 124..... 25

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

ARGUMENT.

REPLY TO PART II OF THE ARGUMENT OF THE DEFENDENT IN ERROR: "THE WISCONSIN UPPER BERTH LAW (CHAP. 272, LAWS OF 1911) IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE ON BEHALF OF THE PUBLIC HEALTH AND WELFARE."

We wish to reply to the second proposition of the Attorney General's brief, to-wit: the claim that this law is a legitimate exercise of the police power of the State in behalf of the *public health and welfare.*

It is unnecessary to discuss the authorities cited. No one denies that the police power ex-

tends to legitimate regulation tending to protect the public health, the welfare, and the morals of the community, and that transportation lines may be compelled to properly serve the public. The real basis of the Attorney General's claim is: that it is necessary to keep the upper berths of sleeping cars closed in order to have proper ventilation and free circulation of air in the cars. It is a complete answer to this proposition to say that under the regulations and the tariffs in force at the present time (under those imposed by authority of the Interstate Commerce Commission as well as of the State of Wisconsin) a passenger may obtain the entire use of the space filled by the upper berth by paying for it 80 per cent. of the price paid for the lower berth. It is argued that by keeping the upper berth closed the passenger is enabled to have more room to stand or kneel in his berth while dressing and undressing and is provided with better ventilation and a freer circulation of air during his occupancy thereof. No one will doubt that the law gives him more space in which to dress and affords him more luxury in traveling; but if he desires this extra accommodation he has the option of purchasing it. The company, however, has a right to keep the upper berth for sale and to use it in such a manner that it may be most available for use for the traveling public.

We have said in the original brief that if it is

necessary to keep up the upper berth in order to protect the health of the passengers, then it would seem that upper berths should never be allowed to be used. If the letting down of an unoccupied upper berth has an injurious effect upon those passengers occupying lower berths, it is apparent that when the upper berths so let down are occupied, the effect must be still more injurious. It cannot make conditions more sanitary or healthful because some one comes along who is willing to pay for the upper berth and who is allowed, therefore, not only to keep it down, but to occupy it himself and so decrease by a considerable amount the number of cubic feet of breathing space falling to the lot of each occupant of the car. But the fallacy of the argument is illustrated by the Attorney General when he says:

> "Whether the legislature, when legislating upon this subject, should adopt as a means of promoting the public health, comfort and convenience a statute such as the Wisconsin Upper Berth Law or one prohibiting entirely the use of the upper berths, is purely a question of expedience in the selection of the means, and is therefore a matter resting exclusively in the sound discretion of the legislature."

We deny, absolutely, that the legislature has power to say that no sleeping car company shall use any upper berths. There is not a particle

of testimony to justify a finding that they are dangerous or injurious to health, and no legislature would be justified in enormously increasing the expense of public travel by prohibiting their use. Both common knowledge and the record in this case demonstrate that such a law would be invalid.

In the case of Coppage v. Kansas, decided January 25, 1915, this court held that a statute which prohibited an employer from prescribing as a condition of employment that an employee should not belong to a labor union, during his term of service, was not a legitimate exercise of the police power. In this case the court pointed out the distinction between those regulations necessary to secure some object directly affecting the public health, or welfare and those regulations interfering with personal liberty and property rights and not necessary to secure such objects. The court said:

> "An evident and controlling distinction is this: that in those cases it has been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, * * * But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that

> concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."

This language is particularly applicable to the law under consideration in the instant case. The statute requiring the company to give the use of the space of the upper berth to the person occupying the lower berth, without payment, is not reasonably to "secure some object directly affecting the public welfare." It materially restricts the normal exercise of the use of property by its owner. It would be more reasonable to prohibit the use of upper berths altogether, for this would at least be consistent, if not necessary to accomplish the object sought. May the legislature, under the guise of a police regulation, require a railroad company to forego the use of upper berth accommodations, and, as we have said, impose additional burdens upon the travelling public merely for the luxury and additional comfort of individual travellers? We believe not and although the Wisconsin statute does not go to such lengths, we believe that it is such laws as the one under consideration, which bring the regulative power of legislatures into discredit.

The cases which we cited in the original brief and the additional cases of Del., Lack., & W.

Rd. v. Board of Public Utilities Comm., 88 Atl. 849 (N. J.), and South Covington & Cincinnati Street Ry. Co. v. City of Covington et al., decided by this court January 5, 1915, demonstrate our position. In the former case the Supreme Court of New Jersey held that a law requiring railroads to carry without compensation certain state officials was invalid. The court said:

> "It is believed that, apart from the police power or some principle of public policy, no court has decided that legislative donations of free transportation are within its reserved right, and if such a decision were found it is difficult to conceive by what principle of law it would be justified."

Again,

> "The right of a railroad company to receive pay for the transportation of passengers is its property, as much as gas, or water, or electricity is the property of corporations authorized to deal in those commodities. * * * and I know of no principle of law or rule of property that will justify the taking of the property of any one of these public service corporations, or, for that matter, of any corporation, and handing it over to public office holders merely because they are the holders of public offices."

In the latter case an ordinance of the City of Covington regulating the operation of street railways required that "The temperature of such cars shall never be permitted to be below 50 de-

grees Fahrenheit." The court dealt with the requirement as follows:

> "As to the regulation affecting the temperature of the cars, and providing that they shall never be permitted to be below 50 Fahrenheit, the undisputed testimony shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable. We therefore think, upon this showing, this feature of the ordinance is unreasonable and cannot be sustained."

In the instant case, the court found "that the closing of upper berths in sleeping cars has very little effect upon the circulation of air in such sleeping cars when the lower berths are made up and ready for occupancy; that the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths in sleeping cars." Counsel misconceives our position. We do not deny the power of the legislature of the states in the absence of action by Congress to pass regulations reasonably necessary or reasonably tending to the protection of the public health, but we do deny that this statute accomplishes that object. The attempted justification of the law on the ground of the necessities of public health and welfare fails utterly.

II.

REPLY TO PART IV OF THE ARGUMENT OF THE DEFENDANT IN ERROR: "THE WISCONSIN UPPER BERTH LAW IS NOT UNCONSTITUTIONAL AS A REGULATION OF INTERSTATE COMMERCE UNDER SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES."

We insist that the law of Wisconsin in so far as it affects cars running in interstate commerce is clearly regulative of the manner of handling such cars, whether or not Congress has acted upon the subject. But it is also clear that Congress has acted upon the general subject, and within the latest decisions of this court such action precludes interference by the legislatures of the states.

The answer alleges the act of Congress, the power of the Commission to regulate the use and operation of sleeping cars and to fix and prescribe the rates of charge for each unit of sleeping car space (to-wit: The lower berth, upper berth, section, compartment, and drawing-room), and that the Commission after full hearing had made an order prescribing the rates for upper and lower berths over this identical route (Record, page 6; stipulation, page 8).

By referring to the Interstate Commerce Act, sections 1, 2, and 6, the following provisions will be found:

"Sec. 1. * * * The term 'common carrier' as used in this Act shall include express companies and sleeping car companies. * * * *and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof* and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor,* * * *

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians and attorneys at law;" etc.

"Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special, rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or re-

ceives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 6 provides for the publication of tariffs and prohibits the carrier from charging any other or different rate than therein provided, the language being as follows:

"Sec. 6. * * * The schedules printed as aforesaid by any common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, effect or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.*

* * * No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and

published in accordance with the provisions of this Act; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith,* between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, *nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs; Provided,* That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carriers.' "

It will thus be seen that "transportation" covers the entire subject of facilities and accommodations to be furnished and requires the common carrier to furnish them; that it prohibits any discrimination by means of any device whatever; and provides for the publication of tariffs which shall specify the places between which the property and passengers are to be carried, the charges for such carriage, and all privileges or facilities granted or allowed, and any rules or regulations which in any wise change or affect or determine the rates, fares, and charges, or the value of the service rendered to the passenger,

shipper, or consignee. The last clause quoted prohibits the carrier from demanding, collecting, or receiving for such service, any greater or less or different compensation than that specified in the tariffs. Nor shall the carrier extend to any shipper or other person any privileges or facilities in the transportation of passengers or property except such as are there specified.

The Commission has the power to fix the form of tariffs and to make rules and regulations for the control of transportation. The Court of Appeals of the Sixth Circuit has held that the extending of credit to one shipper and not extending it to another was equivalent to charging a different compensation and amounted to a discrimination in violation of the act—Hocking Valley Ry. v. United States, 210 Fed. 735—and this court refused a writ of certiorari to review the judgment.

The Attorney General relies very largely upon the case of Missouri Pacific Ry. v. Larabee Mills, 211 U. S. 612. In that case the Missouri Pacific Ry. Co. refused to continue switching cars to the mills for loading, a service it had long performed. Since it was engaged in business as a common carrier, irrespective of any statute of the state, it might be compelled to perform such service in an ordinary action of mandamus. The court by Justice Brewer, said:

> "No legislative enactment, no special mandate from any commission or other administrative board was necessary, for the

duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers."

This statement by Justice Brewer would have been enough to dispose of the case; but the court did go on to hold that in the absence of action by Congress the state may regulate matters which merely incidentally affect interstate commerce and which are for the comfort and convenience of the citizens, basing this holding very largely upon those cases holding valid laws requiring engineers to be examined on account of their eyesight, forbidding trains to run on Sunday, regulating the heating of passenger cars, and similar regulations necessary to the safety and health of the people concerning subjects on which Congress has neither directly or indirectly acted, or upon which no power to act has been delegated to the Interstate Commerce Commission. To be sure, the court did use language which would seem to imply that the mere delegation by Congress to the Commission of similar power would not disturb the authority of the state to act until the Commission itself should do so. There were three dissents in this case, and in view of the later decisions of this court, we doubt if this last statement could be sustained as the law, for if Congress has committed to the Commission the power to make regulations cov-

ering the identical subject, that in itself constitutes Federal action.

C. R. I. & P. Ry. Co. v. Hardwick Elevator Company, 226 U. S. 426. In that case the elevator company demanded of the Rock Island road that it deliver to it certain cars for loading, and upon failure to do so a suit was brought against the company to recover certain demurrage charges for each day of failure, as imposed by an act of the legislature of the State of Minnesota. It appeared in the case that the cars were to be delivered for the purpose of loading them with freight to be transported out of the state. The court held that the general subject of services to be performed by the carrier in interstate commerce was covered by the act of Congress and its enforcement committed to the Interstate Commerce Commission; and that the Minnesota statute imposing the demurrage charges cast a burden upon such commerce, and was therefore invalid. The court reserved the question as to whether the statute would have been invalid in any event had Congress not acted upon the subject. It is to be noted that only the general subject had been committed to the Commission. Congress had not passed any demurrage law, nor had the Commission made any order respecting the subject.

In the case at bar the whole subject of the facilities to be furnished, the regulation of those

facilities, the compensation to be paid for their use, and the accommodation to be given for such compensation, is regulated by Congress and the enforcement of these regulations is committed to the Interstate Commerce Commission.

But it has been said that the particular passenger though riding in a car in transit from Illinois to a point in Wisconsin, was an intrastate passenger. That is true, and to the extent that he was an intrastate passenger we may concede that the rates, fares, and charges which he should pay were subject to regulation by the state, but the state went further and provided what further accommodations he should receive for which he had not paid. Those accommodations were in an interstate car, being held for sale, the price of which sale was regulated under the authority of Congress. The late decision of this court in the case of South Covington & Cincinnati Street Ry Co. v. City of Covington et al, already cited, seems to us to dispose of this question without further argument. In that case street cars were being operated between Cincinnati and Covington in interstate commerce. An ordinance of the City of Covington provided that the street railway company should not permit more than one-third greater in number of passengers to ride or be transported within such cars over and above the number for which seats were provided in the same, and that it should provide cars

enough to so accommodate the passengers. The court said:

> "We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars which are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate commerce might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in Hall v. DeCuir, 95 U. S. 485, 489, 'commerce cannot flourish in the midst of such embarrassments'."

This was in the absence of any regulation by Congress. Now, then, if it was illegal for the City of Covington to provide what room should be furnished passengers on an interstate car when such passengers were simply traveling in intrastate commerce, how can it be legal for the State of Wisconsin to provide what room should be furnished an intrastate passenger also riding

on an interstate car? The only difference is that one passenger is sitting down or standing up and the other is lying down in his berth. In each case the car is an instrumentality of interstate commerce, used both for such traffic and for intrastate traffic; in each case the question is as to the space the passenger shall occupy. If Wisconsin can regulate the handling of the upper berth, Minnesota and Illinois may do so, and a car running from Illinois through Wisconsin and Minnesota might in one night have three different regulations as to the manner of handling the upper berths which are not bought or paid for and which are above lowers occupied by intrastate passengers. Take a car running between Washington and New York, where it passes through the District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, and New York, the porter might be busy putting up or letting down upper berths the entire night in order to comply with the conflicting regulations of the various states crossed in transit.

The authorities principally relied upon by the defendant in error are such cases as those upholding laws regulating the heating of passenger cars, directing that guards and guard posts be placed on railroad approaches, and statutes of similar character, which are police regulations necessary to the safety of passengers and the public generally, and are the proper subject of

state regulation until the federal authority is exerted. For instance, in this same Covington Street Railway Case we have just cited, this court held that the provisions with reference to passengers forbidding them to ride on the rear platforms of cars, unless the same be provided with suitable railings; the provisions requiring the cars to be kept clean, ventilated and fumigated, etc., were regulations of commerce which the state might lawfully make until such time as the federal government should act.

It is argued in this case that all the State of Wisconsin has done is to regulate the use of the car so as to furnish ventilation for the health of the passenger. This is a mere subterfuge; and all the argument in the brief about better ventilation and health of the passenger is met by the mere statement that under the tariffs promulgated both under the authority of the Interstate Commerce Commission and of the State of Wisconsin, the passenger may obtain the use of the upper berth by paying for it. The only use he might make of it whereby he would procure better ventilation when occupying the lower berth is the identical use which the legislature of the State of Wisconsin undertakes to compel the company to furnish for nothing.

We respectfully submit that this regulation interferes with an instrumentality of interstate commerce.

III.

REPLY TO PART V OF THE ARGUMENT OF THE DEFENDANT IN ERROR: "THE WISCONSIN UPPER BERTH LAW IS A VALID EXERCISE OF THE POWER RESERVED TO THE STATE LEGISLATURE BY SECTION 1 OF ARTICLE XI OF THE STATE CONSTITUTION TO ALTER THE CORPORATE FRANCHISE OF THE PLAINTIFF IN ERROR."

It is also urged by the defendant in error that the regulation is a valid exercise of the power reserved to the State Legislature by section 1 of Article XI of the State Constitution, which provides as follows:

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation can not be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The plaintiff in error is a corporation of the State of Wisconsin, organized and existing under general laws enacted by the legislature. It is true that the power to alter or repeal such laws is by virtue of the above section of the State Constitution reserved to that body, but the defendant

in error misconceives the effect of such a reservation. It has no application in the present case, and the regulation in question cannot be justified upon any such ground.

On page 66 of the Attorney General's brief appears the statement that,

> "Its corporate charter *is in all respects* subject to the power expressly reserved by the above quoted provision of the State Constitution. * * *

In our opinion the power reserved has no such broad application. We might concede that the legislative authority under such a reservation is somewhat broader than that possessed by virtue of the police power generally, as defendant in error states on page 66; but it has well defined limits. The Legislature under such a power may amend and alter charters in so far as such amendment or alteration does not deprive the corporation in question of rights guaranteed to it under the constitution. So far, and so far only, may that power be exercised. We have discussed already in our main brief the constitutional rights invaded by the passage and enforcement of the law in question, the taking of the railway company's property for public use without compensation and without due process of law, and the denial to it of the equal protection of the laws. It is entirely proper that the reservation of this power be construed broadly,

and courts have so construed it. *But it was never intended to authorize invasion of constitutional rights, and the courts have consistently refused to countenance legislation enacted in pursuance of it which would have such an effect.* This court has repeatedly recognized this.

In Miller v. State, 15 Wall. 478, 498, Justice Clifford lays down the rule as follows:

> *"The power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation,* but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets."

In Holyoke Co. v. Lyman, 15 Wall. 500, 522, the court, although giving to the power a broad construction, declares that,

> "The power to legislate, founded upon such a reservation, is certainly not without limit. * * * "

and in Shields v. Ohio, 95 U. S. 319, 324, the court states that,

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

In Sinking Fund Case, 99 U. S. 710, 720, Chief Justice Waite says:

"That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; * * * "

In Stearns v. Minn. 179 U. S. 223, 240, the court says:

"That the power of amendment has its limitations, or rather that an amendment may not be wholly as to the right of the State, and absolutely ignoring the right of the other party to the contract, has been adjudged by this court in Louisville Water Company v. Clark, 143 U. S. 1."

And further,

(pg. 259) "But whilst this is settled, it has also been equally determined that the

reserved right to repeal, alter or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law."

In Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201, 211, 213, Mr. Justice Peckham says:

"This court has had frequent occasion to discuss the meaning and extent of the power thus reserved, as it exists in about all the States, either by constitutional or statutory provisions."

And after discussing several prior decisions,

"These cases also hold there is a limitation, even to the power of amendment when reserved in the constitution or a statute of a State. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonably made, in good faith and consistent with the scope and object of the act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases is surrounded by the same sanction and are as inviolable as in other cases."

Pearsall v. Great Northern Ry., 161 U. S. 646.

Adirondack Ry. v. State of New York, 176 U. S. 335, 344.

Duluth & Iron Range Rd. Co. v. St. Louis County, 179 U. S. 302.

In San Joaquin Etc. Co. v. Stanislaus County, 113 Fed. 930, 938, the decision in the lower court of the case just cited it was declared that:

> "These constitutional provisions cannot be held subordinate to the constitutional power conferred upon the state legislature to alter, amend, or repeal general laws concerning corporations. * * * It will not be necessary to refer to the long line of cases in the highest courts of the nation where these constitutional questions have been elaborately discussed, and the rights of property carefully defined, in controversies arising out of legislation affecting corporate rights."

The Supreme Court of Wisconsin has recognized the limitations placed upon the reserve power to amend or repeal corporate charters in several cases. Thus in State ex rel. Northern Pacific Rd. v. Railroad Commission, 140 Wis. 145, 157, the court said:

> "But the court below as well as the Railroad Commission held that the expense of maintaining the crossing and the cost of construction and maintaining the interlocking, derailing, and signal system should be

borne one half by each road. This conclusion is based upon the right of the state to alter or repeal the charter of the senior company and also under the police power. The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted. * * * The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provision of the constitution to the effect that private property shall not be taken for public use without compensation. It follows, therefore, 'that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' "

In Water Power Cases, 148 Wis. 124, it is said:

"We shall not attempt to define the extent or set the limits of the reserved right of repeal contained in the constitution of this state (sec. 1, art. XI) or in a charter further than to say that such power does not

> authorize the confiscation or destruction of property or its taking without just compensation. It is to be construed like all constitutional provisions to harmonize with other commands and restrictions of the same instrument, and it must always yield to that paramount provision of the federal constitution which forbids the state to deprive any person of life, liberty, or property without due process of law and to the substantial equivalent of the latter in our state constitution."

Milwaukee Electric Ry. & Light Co. v. Railroad Commission, 142 N. W. (Wis.) 491;

State v. Northern Pacific Rd., 147 N. W. (Wis.) 219.

The limitation has been widely recognized in other state courts. Thus in Commonwealth v. Essex Co., 13 Gray (Mass.) 239, Chief Justice Shaw said:

> "The remaining question is whether the act of 1856 is justified by the provision in the Rev. Sts. c. 44, §23, that acts of incorporation afterwards passed should be subject to amendment, alteration, or repeal? * *
>
> The power of repeal is limited and qualified, and was so considered in the case of Crease v. Babcock, 23 Pick. 334.
>
> Does this come within the power of the legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it."

And after stating hypothetical cases,

> "Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this; that where, under power in a charter, rights have been acquired and become vested, no amendment or alterations of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

In Detroit v. Detroit & Howell P. R. Co., 43 Mich. 140, Justice Cooley says:

> (Pg. 147) "But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of Albany etc. R. R. Co. v. Brownell, 24 N. Y. 345, is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes, to the same burden except in connection with provision for compensation. * * * The same doctrine is clearly asserted and affirmed in Railroad Company v. Maine, 96 U. S. 499, and is assumed to be unquestionable in the several opinions delivered in the Sinking Fund Cases, 99 U. S. 700. * * *

> But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. * * * It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the 'law of the land.'"

In a very recent case, Del., Lack., & W. Co. v. Board of Public Utilities Com'rs, 88 Atl. 849 (N. J.), the State attempted to justify the passage of a bill calling for the free transportation of certain state officials upon the ground of a reserved power to amend or alter the charters of the interested railway corporations. The

court denied that such a reservation contemplated any such action by the State, and declared,

> (Pg. 851) "Broadly speaking, therefore, the reserved right may be said to be the continuing right of the Legislature to regulate in the interests of the public the corporations created under its laws, and the essential factors of such reserved right, drawn from the nature of the parties thereto, are: (1) Its regulative character, which is derived from the already existing grant; and (2) its promotion of the public welfare which is derived from the presumed purpose of all legislative action.
>
> * * * * * * *
>
> If now we apply this test to the matter immediately in hand, viz., the requirement that the prosecutor shall carry free of charge the members of the State Water Supply Commission whether traveling on official duties or for pleasure, recreation or upon private business, it will be seen at once that such requirement lacks both of these essential elements of an exercise of the reserved right, so that if such requirement were an isolated instance of such legislation, it is not perceived what argument could be advanced to justify it as a constitutional exercise of the reserved right in the face of the indubitable fact that it takes the property of one person, who happens to be an artificial person, and gives it to other persons, who happen to be official persons. An exer-

cise of the reserved right to be legitimately such must be rested upon different grounds from these, and be designed to accomplish different results."

And later,

"It is believed that, apart from the police power or some principle of public policy, no court has decided that legislative donations of free transportation are within its reserved right, and if such a decision were found it is difficult to conceive by what principle of law it would be justified."

In Venner v. Chicago City Ry. Co., 92 N. E. 643, 646, (Ill.), the court declared that:

"Even where the power of the state to alter or amend a charter is expressly reserved in the grant, it is still subject to the limitation that it shall not be exercised in such way as to destroy vested rights or impair the obligations of contracts. *The Legislature cannot reserve the right to pass an unconstitutional law under the guise of altering or amending a corporate charter.*"

Ives v. South Buffalo Ry. Co., 94 N. E. 431 (N. Y.).

We do not think it profitable to discuss the cases cited by the Attorney General in detail. No one denies that the reserve power of amendment of corporate charters should be given a broad scope, and that the State's right of regulation and control should not be impaired or encroached upon. But such an interpretation of the power

certainly does not authorize the passage of *any amendment whatever,* regardless of its effect upon the corporation. To justify the present law in such a manner would deprive the railroad company of vested property rights of great value. The Attorney General, on page 69 in his brief, states that if the general law under which the railway was incorporated had provided that upper berths should be closed when neither occupied nor engaged, when the lower berth was occupied or engaged, such provision would have been a part of the corporate charter. That, of course, is undeniable. But from that it is argued that a subsequent act putting such a provision into a law for the first time simply alters or amends the charter within the scope of the right reserved to the State. We emphatically deny this. The effect which such a regulation would have in depriving the plaintiff in error of its property without due process of law and without any compensation whatever therefor is discussed elsewhere in our briefs. We submit that the statute in question cannot be justified as a valid exercise of the power reserved in the State Constitution to alter or repeal the corporate charter of the plaintiff in error.

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SUBJECT INDEX

		Page
Statement of the case		1
Argument		3
I.	The Highest Court of the State has Construed the Statute and Held it Constitutional	3
II.	The Wisconsin Upper Berth Law (Ch. 272, Laws of 1911) is a Legitimate Exercise of the Police Power of the State in Behalf of the Public Health and Welfare	13
III.	The Wisconsin Upper Berth Law (Ch. 272, Laws of 1911) Does Not Violate any Rights of the Plaintiff in Error Guaranteed by the Fourteenth Amendment	41
IV.	The Wisconsin Upper Berth Law is Not Unconstitutional as a Regulation of Interstate Commerce Under Section 8 of Article I of the Constitution of the United States	49
V.	The Wisconsin Upper Berth Law is a Valid Exercise of the Power Reserved to the State Legislature by Section 1 of Article XI of the State Constitution to Alter the Corporate Franchise of the Plaintiff in Error	65

CASES CITED

Ashland v Wheeler 88 *Wis.*- 607 68
Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280 ..... 14, 19, 29, 32, 34, 48, 58, 62
Atlantic Coast Line Co. R. v. Goldsboro, 232 U. S. 548 ..... 14, 18, 48
Atlantic Coast Line R. Co. v. N. C. Corp. Comm., 206 U. S. 1 ..... 14, 17
Attorney General v. Perkins, 73 Mich. 303 ... 66
Attorney General v. Railroad Cos., 35 Wis. 425 ..... 66, 67, 68, 69
Baltimore & O. R. Co. v. I. C. C., 221 U. S. 612 52
Bangor, O. & M. R. Co. v. Smith, 47 Me. 34 66, 70
Barrett v. Indiana, 229 U. S. 26 ..... 13, 16
Barrett v. New York, 232 U. S. 14 52
Blair v. Mil. etc. R. Co., 20 Wis. 254 65
Brown-Forman Co. v. Kentucky, 217 U. S. 563 ..... 10, 41
Calder v. Michigan, 218 U. S. 591 73
Central Lbr. Co. v. S. Dakota, 226 U. S. 157 39
Chapin v. Crusen, 31 Wis. 209 68
Chi., B. & Q. R. Co. v. Chicago, 166 U. S. 226 45
Chi. B. & Q. R. Co. v. Drainage Commrs., 200 U. S. 561 ..... 13, 15, 47
Chi. R. I. & P. R. Co. v. Hardwick Farmers Elev. Co., 226 U. S. 426 52
Citizens Tel. Co. v. Fuller, 229 U. S. 322 40
Cleveland, etc. R. Co. v. Illinois, 177 U. S. 514 ..... 51, 59
Close v. Glenwood Cemetery, 107 U. S. 466 .. 72
Commonwealth v. Railroad Company, 103 Mass. 254 ..... 66, 70
Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204 51
Davidson v. New Orleans, 96 U. S. 97 45
Davis v. C. C. C. & St. L. Ry., 217 U. S. 157 51
Erie R. Co. v. Williams, 233 U. S. 685 ..... 14, 18, 29, 32, 33, 73
Fairfield v. County of Gallitin, 100 U. S. 47 .. 10

Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379 ..... 67, 70, 73
Garey v. Mining Co., 91 Pac. 369 66
German Alliance Ins. Co. v. Kansas, 233 U. U. 389 40
Gladson v. Minnesota, 166 U. S. 427 ..... 13, 15
Hairston v. Railway Company, 208 U. S. 598 10
Hall v. DeCuir, 95 U. S. 485 59
Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258 72
Hennington v. Georgia, 163 U. S. 299 ..... 8, 13, 14, 56
Illinois Cent. R. Co. v. Behrens, 233 U. S. 473 52
International Harv. Co. v. Missouri, 234 U. S. 199 ..... 29, 40
Jacobson v. Massachusetts, 197 U. S. 11 ..... 8, 10, 13, 14, 16, 32
Janesville v. Carpenter, 77 Wis. 288 44
Johnson v. Southern Pac. Co., 196 U. S. 1 52
Kaiser, etc. v. Curry, 155 Cal. 638 66
Kenosha R. & R. I. R. Co. v. Marsh, 17 Wis. 13 ..... 67, 68
Keokuk Cons. Coke Co. v. Taylor, 234 U. S. 224 40
LaCrosse v. LaCrosse G. & E. Co., 145 Wis. 408 68
Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285 ..... 14, 17
Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684 35
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358 ..... 11, 14, 32, 33, 48
Lawton v. Steele, 152 U. S. 133 ..... 20, 21, 22
License Cases, 5 How. 504 8
Louisville & N. R. Co. v. Eubank, 184 U. S. 27 51
Louisville & N. R. Co. v. Garrett, 231 U. S. 298 59
Louisville & N. R. Co. v. Kentucky, 183 U. S. 503 ..... 10, 36, 58

Madison, etc. Plankroad Co. v. Reynolds, 3 Wis. 287 ..... 65, 67
Manitowoc v. Man. & N. Tr. Co., 145 Wis. 13 68
Matthews v. Corp. Commrs., 97 Fed. 400 73
Mayor, etc. v. Railroad Co., 109 Mass. 103 ..... 66, 70
McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151 13
McGrael v. Phelps, 144 Wis. 1 ..... 20, 21, 22
Minnesota Rate Cases, 230 U. S. 352 ..... 52, 58, 59, 64
M. K. & T. Ry. Co. v. Cade, 233 U. S. 642 40
M. K. & T. Ry. Co. v. Harris, 234 U. S. 412 ..... 58, 63
Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262 59
Mo. Pac. Ry. Co. v. Larabee Mills, 211 U. S. 612 ..... 58, 59, 60, 64
Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 403 44
Morris & E. R. Co. v. Commissioner, 37 N. J. Law 228 66
Munn v. Illinois, 94 U. S. 113 13
Nazro, et al., v. Mer. Mut. Ins. Co., 14 Wis. 295 67
Nevin v. Pullman P. C. Co., 106 Ill. 222 13
New York, etc. R. Co. v. New York, 165 U. S. 628 ..... 56, 57, 58, 59
Noble State Bank v. Haskell, 219 U. S. 104 ..... 48, 73
Northern Cent. Ry. Co. v. Md., 187 U. S. 258 ..... 66, 72
Olcott v. Supervisors, 16 Wall. 678 71
Patsone v. Pennsylvania, 232 U. S. 138 ..... 38, 39
Peik v. Railway Company, 94 U. S. 164 66
Pick v. Rubicon Hydraulic Co., 27 Wis. 433 67
Pratt v. Brown, 3 Wis. 603 ..... 65, 67, 68
Prigg v. Pennsylvania, 16 Petworth 539 8
Pullman Co. v. Kansas, 216 U. S. 56 52
Pullman Co. v. Linke, 203 Fed. 1017 51
Pumpelly v. Green Bay, etc. C. Co., 13 Wall. 166 45
Railroad Commission Cases, 116 U. S. 307 51

St. L. I. M. & S. Ry. Co. v. Edwards, 227 U. S. 265 52
Seaboard Air Line v. Horton, 233 U. S. 492 52
Shields v. Ohio, 95 U. S. 319 ..... 67, 72
Shreveport Rate Cases, 234 U. S. 342 ..... 52, 64
Shreveport Rate Cases, 205 Fed. 380, 391 52
Singer Sew. Mch. Co. v. Brickell, 233 U. S. 304 40
Sinking Fund Cases, 99 U. S. 700 ..... 70, 72
Southern Ry. Co. v. Reid, 222 U. S. 424 52
Southern Ry. Co. v. United States, 222 U. S. 20 52
Spring Valley Water Works v. Schottler, 110 U. S. 347 ..... 67, 72
Stanislaus County v. Irrigation Co., 192 U. S. 201 ..... 67, 72
State v. Anderson, 67 N. E. 207 66
State v. Railway Companies, 128 Wis. 449 ..... 67, 68
State v. C. M. & St. P. Ry. Co., 152 Wis. 341 ..... 3, 31, 35, 49, 50
State v. Milwaukee Gaslight Co., 29 Wis. 454 ..... 65, 67
State v. Redmon, 134 Wis. 89 68
State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 184 ..... 20, 23
State ex rel. McGrael v. Phelps, 144 Wis. 1 68
The Winnebago, 205 U. S. 354 ..... 20, 21, 22
Tomlinson v. Jessup, 15 Wall. 454 51
Union Lime Co. v. C. & N. W. R. Co., 233 U. S. 211 71
United States v. Dewitt, 9 Wall. 41 10
United States Exp. Co. v. Minnesota, 223 U. S. 335 8
Wabash, etc. Ry. Co. v. Illinois, 118 U. S. 557 13
Welch v. Swasey, 214 U. S. 91 59
West Wis. R. Co. v. Trempealeau Co., 35 Wis. 257 ..... 12, 68, 69

Western Union Tel. Co. v. Comm. Milling Co., 218 U. S. 406 58
Western Union Tel. Co. v. Crovo, 220 U. S. 364 58
Western Union Tel. Co. v. Kansas, 216 U. S. 1 52
Whiting v. She. & F. R. Co. et al., 25 Wis. 167 67
Wis. M. & P. R. Co. v. Jacobson, 179 U. S. 287 36

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1914.

No. 177

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Plaintiff in Error,

v.

STATE OF WISCONSIN,

Defendant in Error.

In Error to the Supreme Court of the State of Wisconsin.

BRIEF FOR DEFENDANT IN ERROR.

This case is brought here upon a writ of error to have this court declare the "Wisconsin Upper Berth Law," Chapter 272, laws of the State of Wisconsin for the year 1911, unconstitutional and void. The substantive provision of the state law in question is as follows:

> "Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied."

The act further provides that any corporation which requires, permits or suffers any porter, con-

ductor or other person to violate its provisions shall forfeit to the State a sum not less than fifty nor more than one hundred dollars.

An action was brought by the State against the plaintiff in error in the Circuit Court for Dane County, alleging a violation of this statute, to recover the forfeiture. The Railway Company's answer admitted the facts constituting a violation of the statute, but set up by way of defense that the statute was unconstitutional and void. The trial court found for the defendant and an appeal was taken by the State to the Supreme Court of the State. The Supreme Court reversed the judgment appealed from and directed that judgment be entered for the State for the forfeiture and costs. Thereupon, the plaintiff in error sued out this writ of error to the Supreme Court of the State of Wisconsin, and brings here for review the judgment of that court.

The six assignments of error* are stated on brief and argued by counsel for the plaintiff in error as two propositions.

First. It is contended that the statute in question deprives plaintiff in error of its property without due process of law and denies to it the equal protection of the laws in taking its property for public use without compensation and is, therefore, in violation of the Fourteenth Amendment of the Constitution of the United States.

Second. That the statute is a regulation of interstate commerce and void under section 8 of Article I of the Constitution of the United States.

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*The correction of the sixth assignment of error as stated at page 10 of brief for plaintiff in error is agreed to.

ARGUMENT.

I.

The Highest Court of the State has Construed the Statute and Held it Constitutional.

These contentions, presented on behalf of the plaintiff in error on substantially the same argument as that made here, were both overruled by the Supreme Court of the State.

State v. Chicago, Milwaukee & St. P. Ry. Co., 152 Wis. 341.

The opinion of the Supreme Court of the State, omitting the introductory paragraph, is as follows: (Italics ours)

> "It is urged that the act is invalid because it is clearly and beyond doubt a flagrant violation of defendant's liberty to conduct its business in its accustomed way, and because it arbitrarily interferes with its property rights, in that the regulation provided is in no way promotive of the public welfare, as to its health, comfort, or convenience. As declared in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' It is strenuously urged that the act does not operate on the public generally. This claim is not tenable. *The act in its terms is general in its application and embraces all persons. It includes in its scope all of the public coming within its operation and applies to all parties engaged*

in the conduct of a sleeping-car business. It is, however, asserted that the act applies to so few persons as compared with the great mass of mankind that the effect of its provisions is to confer a special privilege on a comparatively small class of individuals. This misconceives the object and result of the regulation. If we find the law promotive of the comfort and convenience of the public and that it applies to every one who may apply for the service, then it is a general law designed to contribute to the general welfare of all the people. *To make a law general it is not requisite that all members of the public come directly and immediately in contact with the regulation provided; it is sufficient if every one is compelled to comply therewith whenever they place themselves within the field of its operation.*

"But it is argued that the regulation in no way promotes the general welfare, because compliance therewith does not affect the public health nor afford the traveling public conveniences or comforts in any substantial degree. The trial court held that the evidence showed that the public convenience and comfort as a result of compliance with the act would affect the traveling public in but a slight degree and therefore the regulation did not promote the public welfare, and that its enforcement would operate so oppressively on the defendant as to deprive it of its liberty in the conduct of the business, and would invade its property rights to such an extent as to result in a taking of its property without just compensation and without due process of law. *The court's view of the evidence was evidently the result of the court's erroneous idea of what, in the legal sense, is essential to present an occasion or exigency involving the general welfare.* It is common knowledge that practices and conditions in the conduct of the railway passenger traffic of the country, which, in a superficial view, seem, in their effect, of slight importance to travelers, do in reality materially

and substantially affect their comfort and convenience and thus tend to affect their health. They therefore furnish a ground for controlling the conduct of such business in the interest of the comfort and convenience of the public. *In the light of such common knowledge, the evidence in the case tends to show that the effects of this regulation do contribute to the comfort and convenience of the traveling public and thereby contribute to promote their health and the general welfare. All the facts and circumstances disclose that the interests of the public are involved and that the regulation, prescribed for conducting this particular part of the sleeping-car business, is an essential factor in furthering the public interests, and hence such regulation is a proper one for the exertion of legislative activity.* In *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, the court, speaking of the authority of the state to prescribe regulations designed merely to promote the public convenience, declared:

" 'There are, however, numerous decisions by this court to the effect that the states may legislate with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the national constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it.'

"See on the same subject, the opinion in *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 Sup. Ct. 585; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418.

"It remains, however, to consider whether this statute is inconsistent with any right guaranteed to the defendant by the national or state constitution. The terms of the act are broad enough in their scope to embrace all the berths of all sleeping-cars in service within the boundaries of the state. The act, however, must be applied to such cars as the legislature obviously

intended should come within its provisions. It is clear that the berths of a car engaged and occupied by persons who are traveling as interstate travelers cannot be included, since that would be repugnant to the federal constitution, which commits regulation of interestate traffic to Congress, but, if the act can reasonably be interpreted and so applied as to exclude such traffic, it must be presumed that the legislature had no intention to have it apply to traffic beyond their power to regulate. *Since the provisions of the act, in their ordinary significance, can be made applicable to intrastate traffic only, it must be considered, under the circumstances, that the legislature intended that it should be so applied.* Applying the law to intrastate traffic, is it an interference with interstate commerce which is carried on in the cars doing both an intrastate and interstate business? The fact that it may affect in some slight degree the conduct of interstate business in such cars does not make the regulation objectionable on that ground. *There are no specific federal regulations touching this matter which conflict with those of the state, and hence there is nothing to prevent full compliance with the state's requirement. Under such circumstances, the effect of the state regulation can, at most, do no more than incidentally affect the interstate commerce carried on by the defendant, and therefore the objections raised against the law on this ground are not sustained. McDermott v. State,* 143 Wis. 18, 126 N. W. 888, and cases there cited, and those cited above.

"It is contended that the law seeks to regulate a business which is controlled by the so-called Interstate Commerce Act and that the interstate commerce commission has assumed jurisdiction in the matter, as is evidenced by its regulation of interstate rates for berths in sleeping-cars. But does this action of Congress and of the federal commission under it show that the state regulation infringes in any way upon the federal regulation? *As we have seen, there is nothing*

required by the state law that is repugnant to the control thus exercised by Congress, nor is there any direct interference with interstate traffic under operation of the federal law. *The control exercised by these two authorities can therefore be separately carried out without undue obstruction or interference,* and hence the action of Congress in the matter does not preclude the state from exerting its authority under the police power. *We are persuaded that the statute is not in conflict with the so-called Interstate Commerce Act in its regulation of intrastate traffic.*

State v. C. M. & St. P. R. Co., 136 Wis. 407, 117 N. W. 686.

"It is also averred that the enforcement of the state law will deprive the defendant of its property without just compensation, in that compliance therewith compels the defendant to devote the space occupied by a lowered upper berth to the uses of a public purpose without compensation. True, as claimed, the defendant has the right to charge for the use of the upper berth and the space it occupies at the rate fixed by the interstate commerce commission. It is argued that the act is a material interference with defendant's freedom to use that space and the berth in its accustomed way and is a taking of its property for a public purpose without compensation. We discover no such injurious consequences from compliance with the requirements of this law. *The law permits the berths to be occupied and used when any person desires them and thus the defendant is secured against loss for services it may be able to furnish the public. The only act required of it out of its accustomed way of using the space and berth is to keep the upper berth closed until it is engaged for occupancy by some one. If compliance with this command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional cost in the conduct of the business, then the defendant can readily be secured against such loss by having the rate*

adjusted to meet this burden. It must be held that defendant is in no way deprived of the use of its property for a public purpose without just compensation. Applying the act to intrastate transactions appertaining to a service within legislative control, we find the legislative power of the state has been properly exerted to regulate the conduct of this business, and that it is not repugnant to any of the constitutional guaranties of the state and the nation, nor in conflict with any law of Congress on the subject. From these premises it necessarily follows that the circuit court erred in dismissing the complaint. The state is entitled to judgment for recovery of the penalty upon the grounds stated." (152 Wis. 347-352.)

The highest court of the State has, therefore, overruled the arguments advanced on behalf of the plaintiff in error and has held the statute to be a valid and constitutional exercise of the police power of the State. The police power is an attribute of sovereignty inherent in government. The police power of the State is a power which has not been delegated to the federal government, but has been reserved to the states.

License Cases, 5 How. 504;
United States v. Dewitt, 9 Wall. 41;
Prigg v. Pennsylvania, 16 Petworth 539;
Jacobson v. Massachusetts, 197 U. S. 11, 25;
Hennington v. Georgia, 163 U. S. 299, 317.

The exercise by the State of its police power *as such* is no concern of the federal government and is not subject to review or question in this Court. It is only when an exercise of the police power is alleged to invade some right guaranteed by the Constitution of the United States or to invade the field of regulation of interstate commerce com-

mitted by the Constitution to Congress that an exercise of the police power by a state can be reviewed here at all. What is or what is not an exercise of the police power is primarily for the determination of the legislature and the courts of the state. Within the field of its powers of government, the State is supreme to determine for itself its public policy and the extent and character of police regulations which it will set up and enforce for the promotion of the public welfare and the protection of public health and safety.

Of course, a federal question may be raised upon which this Court has undoubted jurisdiction and a clear duty to pass when it is alleged that a pretended exercise of the police power of the State is, in fact, an abuse of that power and is so arbitrary as to amount to an invasion of rights guaranteed under the Federal Constitution. But in passing upon that question this Court will defer to the full limit of what its duty in the premises will permit to the judgment of the legislature and the highest court of the State as to the necessity, propriety and validity of the state regulation.

The case is analagous to that where a state assumes to take or authorize the taking of private property for a public use under the sovereign power of eminent domain and it is alleged that the taking is in reality for a private use and, hence, unconstitutional. In such a case, this Court has held repeatedly that, although it has jurisdiction to determine the question for itself, it will *defer* to the judgment of the highest court of the state as to whether the use be private or public and will accept that judgment unless it appears to be "clearly without ground."

Hairston v. Ry. Co., 208 U. S. 598;
Fairfield v. County of Gallitin, 100 U. S. 47, 52;
Louisville & N. R. Co. v. Kentucky, 183 U. S. 503;
Union Lime Co. v. C. & N. W. R. Co., 233 U. S. 211, 218-219.

Likewise, this Court accepts the judgment of the highest court of the state as to whether a state tax is a license tax or a property tax, although federal constitutional questions are involved.

Brown-Forman Co. v. Kentucky, 217 U. S. 563.

Also, this Court has repeatedly said that it is its duty to defer to the judgment of the legislative and judicial authorities of the state as to the reasonableness, propriety and validity of local enactments for the preservation of the public health and safety. Thus, in *Jacobson v. Massachusetts*, 197 U. S. 11., where a statute of the State of Massachusetts compelled citizens to submit to vaccination against small-pox, the defendant in a criminal prosecution for refusing to comply with the law and submit to vaccination offered to prove that vaccination is of little or no value as a means of preventing the spread of small-pox and is a cause of other diseases. His offers to prove were rejected and he was convicted and his conviction affirmed in the Supreme Court of Massachusetts and in this Court. He contended here that compulsory vaccination was not a legitimate exercise of the police power and was an unconstitutional invasion of personal liberty guaranteed by the Federal Constitution. This Court, in affirming the judgment of the State Court, said:

"While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law." (p. 38.)

Again, in *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, where the enforcement of a municipal ordinance requiring the abandonment of a large cemetery property in the city of San Francisco was resisted as an arbitrary and unwarranted invasion of constitutional rights of property and not a reasonable exercise of the police power, this Court said:

"It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 227. But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins v. Los Angeles*, 195 U. S. 222; *Lochner v. New York*, 198 U. S. 45, 58, et seq. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. *Welch v. Swasey*, 214 U. S. 91, 106. The reluctance must be re-doubled when as here the opinion of that court confirms a specific determination concerning the same spot previously reached by the body that made the law. See *French v. Barber Asphalt Co.*, 181 U. S. 324, 341; *Smith v. Worcester*, 182 Mass. 232, 234, 235." (p. 365.)

In *Welch v. Swasey*, 214 U. S. 91, this Court stated some of the reasons which have compelled it as a matter of judicial policy to establish for itself the rule that it will not set aside the judgment of the legislature and the highest court of the state, except in very clear cases or unless the judgment of the local authorities is clearly without ground upon which it can be sustained. In that case this Court, in affirming the judgment of the State Court sustaining a police regulation with respect to the height of buildings, said:

> "The particular circumstances prevailing at the place or in the State where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare, are all matters which the state court is familiar with, but a like familiarity cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong." (pp. 105-106.)

The cases cited by counsel for plaintiff in error at page 23 of their brief do not hold the contrary.

As to construction and scope of the state law, the decision of the highest court of the state is binding upon this Court.

U. S. Exp. Co. v Minnesota, 223 U. S. 335;
Jacobson v. Massachusetts, 197 U. S. 11, 24.

II.

The Wisconsin Upper Berth Law (Ch. 272, Laws of 1911) is a Legitimate Exercise of the Police Power of the State in Behalf of the Public Health and Welfare.

The plaintiff in error is a public service corporation and its sleeping car business and property, being dedicated by it to a public use, is affected with a public interest and is subject to regulation and control by public authority to the end that the public interest, welfare and convenience may be reasonably subserved.

Munn v. Illinois, 94 U. S. 113;
Nevin v. Pullman P. C. Co., 106 Ill. 222;
McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151.

Moreover, it is settled that the public health, safety, convenience and welfare are legitimate objects in behalf of which the police power of the state may be exercised.

Hennington v. Georgia, 163 U. S. 299;
Gladson v. Minnesota, 166 U. S. 427;
C. B. & Q. R. Co. v. Drainage Commissioners, 200 U. S. 561;
Barrett v. Indiana, 229 U. S. 26;

Jacobson v. Massachusetts, 197 U. S. 11;
L. S. & M. S. R. Co. v. Ohio, 173 U. S. 285;
Atl. Coast Line R. Co. v. N. C. Corp. Comm., 206 U. S. 1;
Atl. Coast Line R. Co. v. Goldsboro, 232 U. S. 548;
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358;
Erie R. Co. v. Williams, 233 U. S. 685;
Atl. Coast Line R. Co. v. Georgia, 234 U. S. 280.

The statute in *Hennington v. Georgia, supra*, was one prohibiting the operation of freight trains on Sunday in that state. It was attacked as an arbitrary interference with the right of the railroad company to conduct its business in its accustomed way and not a valid exercise of the police power because not enacted to subserve any object in behalf of which legislation in the exercise of the police power is authorized, and also upon the ground that it was a direct interference with interstate commerce. This Court sustained the statute upon the ground that a requirement for one day's rest in seven was promotive of public health and morals, and in the course of the opinion stated the principles applying to a review in this court of state legislation enacted in the exercise of the police power in the following language: (Italics ours)

"The legislature having, as will not be disputed, power to enact laws *to promote the order and to secure the comfort, happiness and health* of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best

interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the law-making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature." (163 U. S. 564.)

In the course of the opinion in *Gladson v. Minnesota, supra,* sustaining a statute of that state requiring the stopping of all passenger trains at county seats, the following is said:

"It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State." (166 U. S. 430.)

In *C. B. & Q. R. Co. v. Drainage Commissioners, supra,* it was held that the Farm Drainage Act of the State of Illinois was a proper exercise of the police power of the state and that the property rights of the railroad company in a bridge which it had acquired and constructed over a water course were subject and not paramount to the police power, and that the railway company could be required at its own expense to remove its bridge,

widen the channel of the water course, and, if it desired to continue to operate its road, to build a larger bridge without compensation. It was held that the drainage of farm lands in a drainage district being a public purpose, the promotion of the general welfare and prosperity thereby was a legitimate object for the exercise of the police power of the state, the Court saying,

> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, public morals or the public safety." (200 U. S. 592.)

The case of *Barrett v. Indiana, supra,* involved the validity of a statute of the State of Indiana requiring mining companies to make the entries in their coal mines in which mine-cars are operated a prescribed width on both sides of the track. The validity of the statute was questioned under the Fourteenth Amendment. The Court held that the safety of employees in coal mines was a legitimate purpose in behalf of which the police power of the state could be exercised in the regulation of a lawful business, and said:

> "The legislature is itself the judge of the means necessary and proper to that end, and only such regulations as are palpably arbitrary can be set aside because of the requirements of due process of law under the Federal Constitution." (229 U. S. 29.)

In *Jacobson v. Massachusetts, supra,* it is held that the preservation of the public health is clearly a legitimate object for the exercise of the police

power, and that a compulsory vaccination law was clearly within the legitimate field of legislative discretion to enact as a means of preserving the public health by preventing the spread of a contagious disease.

> "The good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Commonwealth v. Alger*, 7 Cush. 53, 84." (197 U. S. 27.)

This Court, in holding that the police power may be exercised in behalf of the public convenience, in the course of the opinion in *Lake Shore & M. S. R. Co. v. Ohio, supra,* after reviewing several of its earlier decisions, said: (Italics ours)

> "Now, it is evident that these cases had no reference to the health, morals or safety of the people of the State, but only to the public convenience. They recognized the fundamental principle that outside of the field directly occupied by the General Government under the powers granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are *primarily for the determination of the State,* and that its legislative enactments relating to these subjects, and which are not inconsistent with the state constitution, are to be respected and enforced in the courts of the Union if they do not by their operation *directly* entrench upon the authority of the United States or violate some right protected by the National Constitution." (173 U. S. 296-7.)

In *Atlantic Coast Line R. Co. v. N. C. Corp. Comm., supra,* it is held that a common carrier may be required by the State, in the exercise of its police power on behalf of the public convenience, to

furnish a facility or service even at a pecuniary loss to itself, and no valid objection will lie under the Fourteenth Amendment.

In the course of the Court's opinion in *Atlantic Coast Line R. Co. v. Goldsboro, supra,* it is declared upon the citation of numerous authorities,

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. [Citations omitted.] And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law." [Citations omitted.] (232 U. S. 558-9.)

In *Erie R. R. Co. v. Williams, supra,* the Court held that a statute of the State of New York, requiring railroad companies to pay their employees their wages semi-monthly in cash, was a valid exercise of the police power in behalf of the public welfare, and not in violation of the contract clause or the Fourteenth Amendment of the Constitution. In the course of the opinion, the Court said: (Italics ours.)

> "The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by *demonstrating* that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is,

in the first instance, the judge of what is necessary for the public welfare, and a *judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. C. B. & Q. R. R. Co. v. McGuire,* 219 U. S. 549, 565; *German Alliance Insurance Co. v. Kansas, ante,* page 389." (233 U. S. 699.)

And again:

"It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power." (233 U. S. 700.)

And again:

"It is, however, contended by plaintiff that the law under review cannot be sustained either as an exertion of the police power or as an alteration of the charter of plaintiff unless the court can say from a comparison of the systems of payment—monthly and semi-monthly—that the former affects adversely the general welfare or public good and the latter 'remedies that evil or condition and of itself does not constitute an unjust burden upon the employer.' But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said, in the first instance, for the legislature to determine, and *its judgment will not be reviewed unless 'unmistakably and palpably in excess of legislative power.' McLean v. Arkansas,* 211 U. S. p. 547." (233 U. S. 704.)

In *Atlantic Coast Line v. Georgia, supra,* this Court sustained a statute of the State of Georgia, requiring railroad companies operating within that State to equip and maintain locomotives with elec-

tric headlights of prescribed power and size. The railway company contended that the act deprived it of its liberty of contract and of its property without due process of law, in that it compelled the disuse of a material part of the company's present equipment and the substitution of a new appliance as prescribed in the statute. The Court said:

> "The legislature may require an adequate headlight, and whether the carrier's practice is properly conducive to safety, or a new method affording greater protection should be substituted, is a matter for the legislative judgment." (234 U. S. 287.)

And further: (Italics ours.)

> "Assuming that there is room for differences of opinion, this fact does not preclude the exercise of the legislative discretion. *So far as the question was one simply of expediency—as to the best method to provide the desired security —it was within the competency of the legislature to decide it.*" Citing cases. (234 U. S. 288.)

Counsel for plaintiff in error in their argument that the statute here involved is not a valid exercise of the police power quote *State v. Redmon*, 134 Wis. 89; *State ex rel. McGrael v. Phelps*, 144 Wis. 1, and *Lawton v. Steele*, 152 U. S. 133, as declaring the judicial tests by which legislation of this character will be tried. These authorities are not in conflict with those which we have cited *supra*. We make no contention that such legislation is not subject to judicial review. We do not deny the rule quoted by counsel from *McGrael v. Phelps* to the effect that legislation of this character to be valid must be directed to some purpose in behalf of which the exercise of the police power of the state

is legitimate and that the means employed to effect the purpose must be "reasonably adapted" to that end. And, as counsel say, there is no substantial difference between the rule in *McGrael v. Phelps* and that in *Lawton v. Steele*, except perhaps that in the latter case the requirement is stated that means should be "reasonably necessary" to effectuate the object of the legislation.

The reason for this stronger statement of the requirement in *Lawton v. Steele* is found perhaps in the character of the statute there involved, which was one designed to preserve fisheries and which provided for the summary and irretrievable and irremediable destruction of all property used, contrary to its provisions. It would seem that such summary and absolute destruction of private property as a means of enforcing a police regulation should be made to appear "reasonably necessary" for the purpose, whereas, in an ordinary police regulation not involving any destruction of property and not summary in its enforcement, it should be sufficient if the means adopted by the legislature are "reasonably adapted" to the end, which is the language in *McGrael v. Phelps*. This distinction is, however, not of contfolling importance when it is borne in mind that, under the authorities which we have cited *supra*, as well as those authorities cited by counsel for plaintiff in error, it is recognized that the question whether the means be "reasonably adapted," or, if preferred, "reasonably necessary," *is primarily a question for the legislature.*

The legislature, by prescribing the means, will be taken to have resolved that question, however stated, in the affirmative. The judgment of the leg-

islature, while not conclusive, will be deferred to and will not be reviewed or disturbed, unless palpably unjustifiable in reason, all fair doubts being resolved in its favor. Thus it is said in *McGrael v. Phelps:*

> "It is further elementary that the extent to which the legislature may go in the field of police power is primarily a matter for its judgment. As to the case in hand, the same as others, it could not properly go beyond reasonable regulation. However, what is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. Such review does not have to do with expediency. It only deals with whether the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness, all fair doubt being resolved in favor of the proper exercise of law making power." (144 Wis. 18.)

Here follows the language quoted by counsel for plaintiff in error at page 16 of their brief.

As to whether the means adopted by the legislature to effectuate a legitimate purpose of police regulation be reasonably adapted to effect that purpose, the Court continues, saying: (Italics ours.)

> "The second essential, as suggested before, is particularly legislative discretion. So the range of methods of interference is necessarily *as broad as the uttermost boundaries of reason.* Abuse of discretion so clear in the field of fact as not to be fairly justifiable is necessary before the legislative action can be condemned as usurpation. That has been so often treated in this court as to be deemed elementary." (144 Wis. 18-19.)

To the same point this Court in *Lawton v. Steele, supra,* after enumerating several instances of approved exercise of the legislative power, said:

"Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." (152 U. S. 136.)

And again: (Parenthesis ours.)

"If the object to be accomplished is conducive to the public interests, it (the legislature) may exercise a large liberty of choice in the means employed." (p. 140.)

Recognizing the same principle, the Supreme Court of Wisconsin, in *State v. Redmon, supra,* speaking of the "inquiries to be solved in testing an enactment purporting to be for the promotion of public health as to whether it is fairly within the field of police power," said:

"The judgment of the legislature, of course, as to all of them is to be taken as correct, unless it appear to be clearly wrong, and also it is to be taken as true that its ostensible is its actual purpose, unless the contrary clearly appears." (134 Wis. 112.)

From the foregoing authorities, including those cited by counsel for the plaintiff in error, we deduce the following principles:

First. That the public health, welfare and convenience are legitimate objects in behalf of which the State may legislate in the exercise of its police power.

Second. That the means adopted by the legislature, if in any reasonable view adapted to secure or promote any such object, are legitimate means, and the selection of the means is primarily for the

legislature, and that the judgment of the legislature will not be reviewed unless clearly and palpably arbitrary and wrong.

Third. That, in reviewing such legislation, the Court will not inquire into the expediency or relative merits or adaptability of various means, that question being exclusively for the legislature.

Fourth. That the Court, in determining the legitimacy of the means adopted by the legislature, will not declare the means invalid upon mere opinion or difference of opinion, and will consider common knowledge and belief.

Counsel for the plaintiff in error contend that the requirement that the unoccupied upper berth shall be kept closed is not a legitimate means for the promotion of the public convenience, health or welfare, and that its only effect is to give to the occupant of the lower berth added convenience and, in fact, a mere private benefit at the cost and inconvenience of the plaintiff in error, and without compensation. To support this contention, counsel rely in part upon their pleading in the trial court, upon certain testimony there taken over objection, and upon certain findings of the trial court based upon such testimony.

A lower berth in a sleeping car such as those of plaintiff in error, when made up for occupancy, when the upper berth is let down and when the curtains are closed in the front, is a mere box-like compartment without any means of ventilation, unless the window be open, except such as is afforded by the circulation of air through or in and out about the edges of the heavy curtains. The di-

mensions of this compartment are variously given in the testimony as about six feet in length, three to three and one-half feet in width, and three to three and one-half feet in height, and the cubical capacity at from fifty to sixty-two cubic feet. (Agreed Record, pp. 20, 39).

It is clear, therefore, that the closing of the upper berth not only greatly conveniences the occupant of the lower berth in that it gives him sufficient head room to stand or kneel in the berth while dressing and undressing, but gives him also much better ventilation and freer circulation of air by opening up the space above his berth to the top of the car and permitting the circulation of air into and out of the section over the top of the curtains. As the deck lights in the roof of the car are usually kept open, if they are provided with exhaust ventilators, there is free passage for the stale air from the berth up to the ventilators and out of the car. If, on the other hand, the deck lights are not equipped with such ventilators and the air comes in through them, there is unobstructed passage of such fresh air from the deck lights down into the berth. If the window of the lower berth be open and the upper berth is closed, there is much greater freedom of circulation of outside air coming into the berth through the window, not only into the berth, but through and over the curtains of the berth into other parts of the car. Even plaintiff in error's superintendent of sleeping cars admits that closing the unoccupied upper berths will improve the ventilation of sleeping cars. (Agreed record pages 17-20.)

Health and comfort require a certain amount of ventilation and fresh air in sleeping quarters. That

sleeping car berths, operated in the manner which those of the plaintiff in error are operated, are close, stuffy and uncomfortable sleeping quarters for want of sufficient ventilation and fresh air is a matter of common knowledge and experience too well known to admit of any nice refinements of medical or expert opinion as to the sufficiency of ventilation or the lack of it for the health, comfort and welfare of the public occupying sleeping cars.

A normal adult requires for health and comfort, according to elementary hygiene, about eight hundred cubic feet of *fresh* air, which, in order to be kept fresh, must be renewed three times per hour. As a lower berth, with the upper berth closed, contains only about fifty to sixty cubic feet of air, this air must be renewed about forty times an hour if the occupant is to have the necessary forty-two hundred cubic feet of fresh air hourly. That the air in such berths under any ordinary conditions is not renewed this number of times or anything like it is self-evident to any one who has occupied such a berth, and is fairly admitted by the witnesses for the plaintiff in error in the trial court. (Agreed Record, pp. 39, 54).

It is a matter of common knowledge that railroad trains are a most ready means for the dissemination of contagious and infectious diseases. The bed clothing, drapery and upholstering of sleeping cars in particular provide excellent lodgment and habitats for disease germs of every description. A more adaptable environment for their propagation is difficult to conceive.

Tuberculosis and pneumonia have for some time headed the mortality lists of the country. Statis-

tics show that out of every ten deaths in the state of Wisconsin, one is due to tuberculosis. (21st Report of Wisconsin State Board of Health.)

Science has demonstrated that both tuberculosis and pneumonia are attributable to unhealthful surroundings and particularly to contaminated air. It has proven that they may be readily checked, if not eradicated, by the adoption of simple hygienic measures. These diseases yield more readily to what is known as the fresh air treatment than to any other. Consequently a crusade has been for the past few years and now is being waged against these diseases. As examples of the means employed may be cited the anti-spitting ordinances adopted by many cities, the quarantining of patients suffering from these ailments, the covering of bed clothing in hotels with sheets (most of the sleeping car companies have adopted this measure voluntarily), and the maintenance by the State and municipalities of institutions affording fresh air treatment. Sweat shops have been abolished, tenement houses regulated, and factories and work shops ventilated at the command of the State.

Anything which prevents the contraction of either of these diseases by the individual clearly tends toward the health and welfare of society; consequently the benefit to be conferred by this law is as much for the public at large as for the occupant of the berth, in that by rendering his surroundings more healthful he is proportionately less liable to contract a disease which he may and probably will readily disseminate.

These are the considerations—the conditions—which presumably actuated the legislature in the

enactment of the law, and would seem to reasonably justify it a valid police regulation. It would therefore seem apparent that in passing the law in question the legislature had in mind the health and welfare of the public generally as well as the comfort and convenience of the occupants of lower berths in sleeping cars.

Counsel for the plaintiff in error argue that the statute is not a regulation in the interests of health, comfort or convenience of the public occupying sleeping cars, because if it were needed and intended for that purpose it would prohibit entirely the use of upper berths in sleeping cars. Whether the legislature, in legislating upon this subject, should adopt as a means of promoting the public health, comfort and convenience a statute such as the Wisconsin upper berth law or one prohibiting entirely the use of upper berths, is purely a question of expediency in the selection of the means, and is, therefore, a matter resting exclusively in the sound discretion of the legislature. It is clearly within the province of legislative discretion to measure the degree of interference or restraint to be exercised by the state with or over the conduct of business affecting the public according to the gravity of the evil sought to be remedied and its judgment in that respect can not be questioned upon the ground that the measures of restraint or regulation which it has selected are not the most complete, the most efficacious or the most expedient.

According to the answer of the plaintiff in error filed in this action in the trial court, only about half as many upper berths are used by travelers

in Wisconsin as lower berths (Agreed Record, p. 5). According to the testimony of plaintiff in error's superintendent of sleeping car service, practically only the lower berths are sold. (Agreed Record, p. 21.)

This record, therefore, fairly supports the inference that in general most of the upper berths—certainly more than half of them—are unsold and unoccupied. The operation of the statute would, therefore, result in keeping half at least and probably nearly all upper berths closed on most sleeping cars generally. It accomplishes this result without substantial restraint upon sleeping car companies in the conduct of their business and without material interference with their revenues or the management of their property. It was clearly competent for the legislature to choose, of the two proposed measures, that which, with very slight restraint or interference, would accomplish much in the direction of the legislative purpose to promote the public health, comfort and convenience, rather than that measure, which, at the cost of very great interference with the business and revenues of sleeping car companies, would yield slightly greater public benefits.

A police measure need not be the most adequate conceivable to accomplish the legislative purpose. It is sufficient that the measure adopted tends to reduce the danger or promote the public health or convenience.

Freund, Police Power, sec. 149;
Erie R. R. Co. v. Williams, supra;
Atlantic Coast Line v. Georgia, supra;
International Harvester Co. v. Missouri, 234 U. S. 199.

It cannot be reasonably contradicted that the removal of all upper berths would inure to the health and convenience of the traveling public. Instead of requiring the upper berths to be at all times closed, or to prohibit their use entirely, the legislature has seen fit to merely regulate the use of such berths when neither "engaged nor occupied." If the absolute elimination of upper berths would promote the public health or convenience, as would seem self-evident, in view of the fact that again the amount of air space would thereby be afforded the occupants of the car, surely the closing of such upper berths as are not engaged or occupied would at least tend towards the accomplishment of the same objects.

The legislature of the State has asserted that the statute is a regulation to promote public health, welfare and convenience, all concededly legitimate objects of legislative care and regulation. Acting peculiarly in the field of legislative discretion, the legislature has selected as a means of promoting these objects the requirements of this statute. In the selection of such means the legislature was guided and informed by, at least, common knowledge and experience of the effect of fresh air and ventilation or the lack of it upon the health, comfort and convenience of the public occupying sleeping car berths. The judgment of the legislature in that respect must be approved unless the court is prepared to say that it is wholly irrational and clearly without any basis in fact or reason. If it may be said merely that reasonable men might differ as to whether the means chosen have such relation to the objects of the law as to be adapted

to promote these objects, then clearly the judgment of the legislature is within, not without the boundaries of reason and cannot justly be said to be unreasonable from the standpoint of a reviewing court.

The trial court erred in assuming to try the reasonableness of this exercise of legislative judgment by the opinion evidence of hired experts offered as witnesses by the plaintiff in error. It erred in assuming that in making its findings of fact and conclusions of law it was bound by such evidence, and the Supreme Court of the State so held and adjudged. Upon this ground, it expressly overruled the findings and conclusions of the trial court as to the reasonableness of the statute, and in the opinion said: (Italics ours.)

> *"The court's view of the evidence was evidently the result of the court's erroneous idea of what, in the legal sense, is essential to present an occasion or exigency involving the general welfare.* It is common knowledge that practices and conditions in the conduct of the railway passenger traffic of the country, which, in a superficial view, seem, in their effect, of slight importance to travelers, do in reality materially and substantially affect their comfort and convenience and thus tend to affect their health. They therefore furnish a ground for controlling the conduct of such business in the interest of the comfort and convenience of the public. *In the light of such common knowledge, the evidence in the case tends to show that the effects of this regulation do contribute to promote their health and the general welfare. All the facts and circumstances disclose that the interests of the public are involved and that the regulation, prescribed for conducting this particular part of the sleeping-car business, is an essential factor in furthering the public interests, and hence such regulation is*

a proper one for the exertion of legislative activity." (152 Wis. 349.)

This position of the State Supreme Court in this case accords precisely with the decisions of this Court in *Jacobson v. Massachusetts, Laurel Hill Cemetery v. San Francisco, Erie Railroad Company v. Williams* and *Atlantic Coast Line v. Georgia, supra;* and other cases might be cited. Thus, in *Jacobson v. Massachusetts*, the evidence offered by the plaintiff in error upon his trial to prove that the requirement of compulsory vaccination was not a preventative of small-pox or small-pox contagion, and was injurious to health and dangerous to the person vaccinated, was excluded. Upon this point this Court quotes with approval from the decision of the Supreme Court of Massachusetts. The language is equally applicable in the instant case.

> "'The defendant "offered to prove and show by competent evidence" these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only "competent evidence" that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Commonwealth v. Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. * * * If

the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.'" (197 U. S. 23-24.)

In the *Laurel Hill Cemetery Case* it was averred on the bill that the cemetery was in no way injurious to health or offensive or otherwise an interference with the enjoyment of property or life. Referring to this contention and the opinions of scientific men cited by plaintiff in error in support of it, this Court said:

"If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded." (216 U. S. 365.)

For the same reason this Court said in *Erie Railroad Co. v. Williams:*

"The legislature is in the first instance the judge of what is necessary for the public welfare and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance." (233 U. S. 699.)

And again in *Atlantic Coast Line v. Georgia,* the headlight case, the Court declared that room for difference of opinion does not preclude the exercise of the legislative discretion.

The result of the foregoing is that an enactment which has support in common knowledge or in common belief is supported by opinion. Opinion evidence offered in opposition to it may be excluded as immaterial or, if received, is not binding upon the court. No court is bound to surrender its common knowledge or its participation in a common belief or its common sense in deference to the opinions of hired experts. Such expert opinion, if received in evidence, serves only to create *a difference of opinion* as to the reasonableness, propriety or adaptability of the legislation to the legislative purpose. It, therefore, becomes immaterial because "the earnest conflict of serious opinion does not suffice to bring" the legislative determination "within the range of judicial cognizance." For the question before the court is not one of expediency or propriety, but one of legislative power.

Counsel for the plaintiff in error contend on brief that the statute here is one which promotes only the convenience of the occupant of the lower berth in a section, the upper berth of which is unoccupied, and that this presents an invalid classification in that the persons convenienced do not constitute a legitimate class in behalf of which the legislative power may be asserted.

The first of these contentions deals with a question of fact and is not so clearly supported by the record that the judgment of the legislature in that

respect ought to be overruled by the Court. Moreover, counsel's contention is contrary to common knowledge and common belief. Even the expert witnesses called by the plaintiff in error admitted upon the trial, in the testimony above referred to, that the keeping of upper berths closed would affect somewhat the ventilation of the sleeping car generally and would increase somewhat the circulation of air in the car. Moreover, it accords with mere common sense that, if the circulation of air into and out of lower berths is so impeded by the lowering of the upper berth that the air in lower berths becomes stale, such stale air, laden possibly with disease germs, will circulate more or less into other parts of the car and into other berths and tend to endanger the health of occupants of such other berths.

The contention that the statute presents an invalid classification is overruled by the Supreme Court of the State in the following language:

> "The act in its terms is general in its application and embraces all persons. It includes in its scope all of the public coming within its operation and applies to all persons engaged in the conduct of a sleeping car business. * * * To make a law general it is not requisite that all members of the public come directly and immediately in contact with the regulation provided; it is sufficient if everyone is compelled to comply therewith whenever they place themselves within the field of its operation." (152 Wis. 348.)

The only authority cited by counsel for plaintiff in error in support of their contention upon this point is *L. S. & M. S. Ry. Co. v. Smith*, 173 U. S. 684. The decision in that case was limited to the peculiar

facts of that case and this fact is emphasized in the second syllabus paragraph of the official report. It is proper to mention, also, that four of the justices dissented in that case and that only three times in the fifteen years since that case was decided do we find it cited in the opinions of this court (*Railroad Co. v. Jacobson*, 179 U. S. 297, 301; *L. & N. R. Co. v. Kentucky*, 183 U. S. 511), and only once to the proposition to which it is cited by counsel here, and then only to distinguish it (179 U. S. 301).

That case holds no more as a general proposition in support of counsel's contention than simply that the purchase of a thousand miles of railroad passenger transportation at one time by an individual for himself and family does not constitute a valid basis of classification upon which the legislature may treat such purchasers as a class and require a railroad company to sell them transportation at a substantially lower rate than the reasonable rates established for the public generally. We think the case is not in point here.

The statute here does not confer upon a class a privilege of which they may at their own election avail themselves for their own benefit. Counsel's argument, insofar as it depends upon the assertion repeatedly made upon their brief that the purpose or effect of the statute is to require the plaintiff in error to give gratis to occupants of lower berths the use of unoccupied upper berths, is, we think, based upon a clear misstatement of the statute. An instance is the language at page 22 of counsel's brief: "The statute, however, attempts to compel the furnishing of the upper berth in the section and to

compel the plaintiff in error to give him (the purchaser of the lower berth) the use of the upper berth and the right to control it * * * ."

Of course, the statute does no such thing. The only way in which the occupant of the lower berth may have the use and control of the upper berth under the statute is by engaging the upper berth. Unless the upper berth is occupied or engaged, *the State* by this act takes control of it and requires that it be *kept closed*, thereby *forbidding the use* of it except such use as the plaintiff in error may make of it while closed. In such control or such disposition of the upper berth, the occupant of the lower berth has no voice.

The object of the statute, therefore, is not to secure to the occupant of the lower berth a free privilege in the use or control of the upper berth. Its object is rather to promote the health, comfort and convenience of the public occupying sleeping cars by requiring sleeping car companies to refrain from a pernicious practice, *needlessly* dangerous to health and *needlessly* destructive of comfort and convenience. This practice, here defended by the plaintiff in error, is hardly less unreasonable than it would be for the plaintiff in error, in cases where only the lower berth of a section is sold, to insist on keeping the upper berth down in the day time upon the ground that the purchaser of the lower berth, not having purchased the upper berth, is not entitled to the space above it or to breathe the air in that space.

We contend that the statute does and was intended to promote the health, comfort and convenience of sleeping car passengers generally. That

it more directly and more clearly promotes the health, comfort and convenience of occupants of lower berths does not constitute an unlawful classification, if indeed it presents any question of classification at all. The classification, if it be such, is one based upon the practical necessities of the situation.

The requirement of the statute amounts simply to this—"unoccupied upper berths in sleeping cars shall be kept closed". So far as this requirement presents any question of classification, it is a classification not of persons, but of the sleeping car berths required to be kept closed. From their position in the upper part of the car, there is a clear difference between upper berths and lower berths in respect to the effect which keeping them open or closed will have upon the circulation of air and the ventilation of the car. In this difference of condition, there is ample basis for making the statute apply only to the upper berths. Obviously, moreover, there is such difference of condition as between an upper berth which is engaged or occupied and one which is neither engaged nor occupied as to afford a reasonable basis upon which the legislature might treat them differently. The classification of the statute is one drawn to reach precisely the evil against which the law is directed, namely, the *unreasonable and unnecessary* jeopardizing of the health and destruction of the comfort and convenience of sleeping car passengers caused by the practice of lowering and keeping down the unoccupied upper berths. It is elementary that "a State may classify with reference to the evil to be prevented."

Patsone v. Pennsylvania, 232 U. S. 138, 144, and cases cited.

And the legislature may "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

Central Lbr. Co. v. S. Dakota, 226 U. S. 157, 160, and cases cited.

The same considerations will, moreover, support the classification of this statute regarded as a classification of passengers, for, even so regarded, it rests upon a reasonable recognition of actual difference of condition and situation. That it is not practicable in the situation dealt with for the legislature, without imposing an unreasonable restraint upon and interposing an unreasonable interference with the management of sleeping cars, to secure to all passengers on sleeping cars under all conditions equal protection to health and equal comfort and convenience surely will not be held to deny the legislature the power to accomplish as much in that behalf as it can by the exercise of a reasonable restraint. This and no more the statute does. It does this under all situations and in behalf of all sleeping car passengers in whose behalf it is practicable under the conditions to accord any measure of relief.

This, we think, clearly presents a valid basis for classification within the principle recognized in *Patsone v. Pennsylvania*, and *Central Lumber Co. v. S. Dakota, supra.* It is said that the legislature has a broad power to classify and a wide range of discretion in that regard, and that the courts will not interfere if there is any rational basis for the classification.

Singer Sewing Mch. Co. v. Brickell, 233 U. S. 304, 315-316;
German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 418;
International Harvester Co. v. Missouri, 234 U. S. 199, 211-214;
Keokuk Cons. Coke Co. v. Taylor, 234 U. S. 224, 227.

As said in *Insurance Co. v. Kansas, supra:*

"A citation of cases is not necessary, nor for the general principle that a discrimination is valid, if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear, and even degrees of evil may determine its exercise." (p. 418.)

And again in *International Harvester Co. v. Missouri, supra:*

"Classification must be accommodated to the problems of legislation * * *." (p. 212.)

In the foregoing cases it was urged that the classification by the legislature was invalid under the Fourteenth Amendment. The Fourteenth Amendment does not require that state laws shall be perfect or that classifications made by the legislature shall be in all cases exact.

M. K. & T. Ry. Co. v. Cade, 233 U. S. 642, 649-650, and cases cited.

It is only when the legislative classification amounts to "clear and hostile discrimination" that this Court will declare it violative of the Fourteenth Amendment.

Citizens Tel. Co. v. Fuller, 229 U. S. 322, 331.

So far as the construction of the State Court, limiting the application of the statute to intrastate passengers, presents any question of classification, there is clearly a legitimate basis in that this construction is adopted in recognition of the limitation upon the State's power.

Brown-Forman Co. v. Kentucky, 217 U. S. 563, 576.

We submit that the statute makes no arbitrary discrimination in violation of any known rule of classification or of the Fourteenth Amendment.

Further, we submit that the statute is a valid exercise of the police power of the State asserted in behalf of the public health, comfort and convenience intended and designed to prevent a pernicious practice, amounting to an evil, in the conduct of a public service business, and that from the standpoint of judicial review, it is reasonably adapted to that end.

III.

The Wisconsin Upper Berth Law (Ch. 272, Laws of 1911) Does Not Violate Any Rights of the Plaintiff in Error Guaranteed by the Fourteenth Amendment.

The contention made on brief for plaintiff in error that the Wisconsin upper berth law is not a valid exercise of the police power, but an arbitrary and unwarranted interference with the right of plaintiff in error to conduct its business in its accustomed way and, therefore, a denial of due process of law and equal protection of the laws in vio-

lation of the Fourteenth Amendment, we have treated in the preceding division of this brief. It remains under this heading, therefore, only to consider whether this statute is a taking of plaintiff's property without compensation and, hence, without due process of law, and hence, also, a denial to the plaintiff in error of the equal protection of the laws, in violation of the Fourteenth Amendment.

The alleged "taking" of its property, of which the plaintiff in error complains, is that the statute, by requiring that upper berths in sleeping cars shall be kept closed unless engaged or occupied, deprives the plaintiff in error of the use and control of such upper berths for the purpose of preparing and having the same ready in advance for occupancy in the event that they are engaged en route. It is not claimed and cannot be claimed that the statute operates to deprive the plaintiff of the use of any berth, in the event of its being engaged, or of the opportunity to receive earnings therefrom in that event. The statute expressly applies to upper berths only when neither *"engaged nor occupied"* and the Supreme Court of the State has held that "the law permits the berths to be occupied and used when any person desires them, and thus the defendant is secured against loss for services it may be able to furnish the public." (152 Wis. 351.)

But it is claimed that the upper berths cannot be conveniently opened, let down and made ready for occupancy when the lower berths are occupied and the Court is asked to consider a supposititious case, in which the plaintiff in error would be greatly inconvenienced, if all of the lower berths in its sleeping cars were occupied and it is pre-

vented by this statute from letting down and making ready any of the upper berths before reaching "a populous town where it customarily takes on passengers at a late hour at night." Brief for plaintiff in error, p. 13.

Of course, this Court, as it has repeatedly said, will not consider the constitutionality of state laws from the standpoint of their alleged operation in supposititious and extreme cases. No such case is shown on the record here. On the other hand, the practice is so general and so clearly one of common knowledge as to be judicially noticed by this Court that sleeping car berths desired for occupancy by passengers boarding the train en route are usually reserved and engaged by telegram or otherwise before the train starts from the point at which it is made up. The common and prevailing practice of railroad companies to telegraph without charge such reservations upon application of prospective passengers is a matter of general and common knowledge. Moreover, it appears in this case that generally a comparatively small proportion of the upper berths are occupied at all.

In view of these facts, it is reasonably clear that no such degree of inconvenience, as that pictured upon the brief for plaintiff in error as likely to result from the necessity of making up and preparing for occupancy upper berths engaged after lower berths in the same sections are occupied, will be realized in practice. Indeed, in the light of common knowledge and of the knowledge in which the legislature will be presumed to have acted, we may assert, and fairly, that single instances even of such inconvenience will be rare. It

is, moreover, admitted by one of the expert witnesses called on behalf of the plaintiff in error in the trial court that any such inconvenience could be substantially minimized by making up some upper berths and then closing them, so that when they are let down for occupancy they would only require "to be straightened up a little and the pillows arranged in the proper position." (Agreed Record, p. 31).

As bearing upon this question of inconvenience, it is admitted also, that some sleeping car companies have voluntarily adopted the practice of keeping upper berths closed when not occupied. (Agreed Record, p. 30).

The general language quoted and authorities cited by counsel for plaintiff in error in support of their contention upon this point at pages 20 to 22 of their brief should be considered in the light of the subject matter and effect of the statutes dealt with in those cases. So considered, none of them, we think, reach to any point fairly presented by the statute being reviewed here.

Th case of *Janesville v. Carpenter*, 77 Wis. 288, involved a statute which for all time prohibited riparian land owners to erect any buildings or structures on their own land in the bed of a stream, which the Court had previously held was legally abandoned for purposes of navigation.

The regulation involved in *Mo. P. Ry. Co. v. Nebraska*, 164 U. S. 403, was an order of the Nebraska Board of Transportation, in terms requiring the railway company to grant to certain persons constituting the Elmwood Farmers Alliance a site or location for an elevator, to be erected and used by

them for the storage of grain, upon land belonging to the railway company and a part of its right of way.

The *dicta* quoted by counsel from *Davidson v. New Orleans*, 96 U. S. 97, 102, that a statute which would divest "A" of his exclusive title in a piece of land and confer it on "B" would be as against "A" a deprivation of property without due process of law in violation of the Fourteenth Amendment, we do not question as a statement of the construction of the Fourteenth Amendment as settled by the decisions of this court, but we deny that it has any application to the statute here.

The case of *Pumpelly v. Green Bay, etc. Canal Co.*, 13 Wall. 166, was an action in trespass for damages against the Canal Company for overflowing the plaintiff's land by constructing and maintaining a dam. It was alleged that the over-flow remained continuously from the completion of the dam to the commencement of the suit, several years, and "worked an almost complete destruction of the value of the land." (p. 177.) The *Fourteenth Amendment was not involved*, and the effect of the decision is simply that the overflowing of plaintiff's land in this manner, amounting to *a permanent and practically complete destruction* of its value, was a taking of private property for a public use, for which just compensation must be made under that provision of the State Constitution which ordains that "The property of no person shall be taken for public use without just compensation therefor."

The case of *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226, arose upon condemnation proceedings insti-

tuted by the city of Chicago to condemn a part of the railway company's right of way for street uses. Here was a clear, conceded and permanent taking of the railway company's land. The constitutional question in the case was whether the inadequacy of the compensation awarded presented a federal question under the "due process" clause of the Fourteenth Amendment. The decision is but one of several by which this Court has settled, as we have conceded, that the "due process" clause of the Fourteenth Amendment, is a federal constitutional prohibition against the State, equivalent to the limitation placed upon the Federal Government in the Fifth Amendment of the Federal Constitution and the limitation placed upon the State government in the provision of the State Constitution above quoted. That question, we think, is not here, because, as we shall presently show, the statute here works no *"taking"* of private or other property in the constitutional sense.

It will be observed that the authorities cited by counsel involved in each case a substantial and more or less permanent deprivation or destruction of property—in each case either real estate or an interest therein. Clearly, none of them involved an exercise of the police power and in only one of them was it even attempted to justify the taking under that power.

Here the alleged "taking" of the property of plaintiff in error is merely an interference with or regulation of the use and control of it for a few hours and only when the plaintiff is unable to sell the use of it for occupancy. The only injury resulting to the plaintiff in error from such "taking"

is some slight and occasional inconvenience in the event it is found necessary to let down and make ready for occupancy an upper berth after the lower berth in the same section is occupied. Such a "taking" of property is, in any event, fairly within the maxim *"de minimis non curat lex."* Certainly, it does not require a case of paramount public necessity to justify so slight an interference with the rights of proprietorship *when that interference is an assertion by the State of its power to regulate a property and business devoted to a public use.*

That the Fourteenth Amendment does not supersede the police power of the State or prohibit the State, in the exercise of the police power, to restrain and regulate the use and control of property by its owner, is well settled. Nor does the Fourteenth Amendment prohibit the State to impose and enforce upon public service companies and the like in the course of their public service uncompensated duties in behalf of the public health, safety or convenience. Such is not a "taking" of private property in the constitutional sense, but merely the assertion of a lawful authority over it, to which the right of property itself is subject, not paramount.

Thus, this Court, in *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 561, overruled the contention here made by counsel in the following language:

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limita-

tions upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given.' Sedgwick's Stat. & Const. Law, 434." (pp. 593-4.)

It would be superfluous to multiply citations of authority to this proposition. It is frequently declared upon the decisions of this Court and several instances of its assertion and application are found in cases we have already cited.

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558-9;

Laurel Hill Cemetery v. San Francisco, 216 U. S. 358;

Atlantic Coast Line v. Georgia, 234 U. S. 280.

See also

Noble State Bank v. Haskell, 219 U. S. 104, 110.

IV.

The Wisconsin Upper Berth Law Is Not Unconstitutional as a Regulation of Interstate Commerce under Section 8 of Article I of the Constitution of the United States.

The Supreme Court of the State has construed the Act to exclude in its direct operation interstate traffic and as applying to intrastate traffic only. This construction is conclusive here. But counsel for the plaintiff in error contended that, in so much as its sleeping cars carry both interstate and intrastate passengers, and such mingling of the two classes of traffic has been recognized by this Court as a matter of economic necessity, that such cars and every part of them are instrumentalities of interstate commerce, and that, therefore, the State may put forth no regulation or control over them. It is claimed that, as Congress by the Interstate Commerce Act has conferred upon the Interstate Commerce Commission some jurisdiction over sleeping car companies, including authority to regulate their rates and prevent them practicing unjust discrimination, the State is excluded from exercising any control over them in any manner affecting their facilities employed in interstate commerce or resulting in any treatment of their intrastate traffic different from that accorded their interstate traffic. Touching this point, the State Supreme Court said:

"Applying the law to intrastate traffic, is it an interference with interstate commerce which is

carried on in the cars doing both an intrastate and interstate business? The fact that it may affect in some slight degree the conduct of interstate business in such cars does not make the regulation objectionable on that ground. *There are no specific federal regulations touching this matter which conflict with those of the state, and hence there is nothing to prevent full compliance with the state's requirement. Under such circumstances, the effect of the state regulation can, at most, do no more than incidentally affect the interstate commerce carried on by the defendant, and therefore the objections raised against the law on this ground are not sustained. McDermott v. State,* 143 Wis. 18, 126 N. W. 888, and cases there cited, and those cited above.

"It is contended that the law seeks to regulate a business which is controlled by the so-called Interstate Commerce Act and that the Interstate Commerce Commission has assumed jurisdiction in the matter, as is evidenced by its regulation of interstate rates for berths in sleeping cars. But does this action of Congress and of the federal commission under it show that the state regulation infringes in any way upon the federal regulation? *As we have seen, there is nothing required by the state law that is repugnant to the control thus exercised by Congress,* nor is there any direct interference with interstate traffic under operation of the federal law. *The control exercised by these two authorities can therefore be separately carried out without undue obstruction or interference,* and hence the action of Congress in the matter does not preclude the state from exerting its authority under the police power. *We are persuaded that the statute is not in conflict with the so-called Interstate Commerce Act in its regulation of intrastate traffic. State v. C. M. & St. P. R. Co.,* 136 Wis. 407, 117 N. W. 686." (152 Wis. 350-351.)

The Constitution, in section 8 of Article I, confers upon Congress power to regulate interstate com-

merce, but the regulation of intrastate commerce, not being delegated to the United States, is a power by the Tenth Amendment expressly "reserved to the states respectively, or to the people." While the police power of the State may not be exercised directly and materially to burden or interfere with interstate commerce, it does not follow that every exercise of the police power of the state affecting interstate commerce in any manner is void under the commerce clause of the Federal Constitution. Counsel for the plaintiff in error cite on their brief a number of cases to sustain their contention upon this point. These cases may be classified as follows:

Cases in which it is held or asserted that the state can not *directly* regulate *interstate* rates.

L. & N. R. Co. v. Eubank, 184 U. S. 27;
Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204;
Railroad Commission Cases, 116 U. S. 307.

Cases in which it is held that the commerce clause prohibits a state *directly obstructing* interstate commerce

by an unreasonable regulation requiring the stopping of interstate trains at stations.
Cleveland etc. R. Co. v. Illinois, 177 U. S. 514.

by attachment and holding of a sleeping car carrying interstate passengers.
Pullman Co. v. Linke, 203 Fed. 1017.

But see *Davis v. C. C. C. & St. L. Ry.*, 217 U. S. 157, and *The Winnebago*, 205 U. S. 354.

Cases in which it is held that the commerce clause prohibits the *burdening* of interstate commerce by state *license fees* or *taxes thereon*.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Pullman Company v. Kansas, 216 U. S. 56;
Barrett v. New York, 232 U. S. 14.

Cases holding void under the commerce clause direct regulations of *interstate* commerce found to *contravene specific* provisions of the Interstate Commerce Act.

Southern Railway Co. v. Reid, 222 U. S. 424;
C. R. I. & P. Ry. Co. v. Hardwick Farmers Elev. Co., 226 U. S. 426;
St. L. I. M. & S. Ry. Co. v. Edwards, 227 U. S. 265.

Cases under the Federal Safety Appliance, Hours of Service and Employers Liability Acts, in which is asserted the *power* of Congress by *express* act to regulate instrumentalities of commerce, whether engaged exclusively in interstate commerce or not, *upon the ground that such regulation directly affects and promotes interstate commerce.*

Southern Railway Co. v. United States, 222 U. S. 20;
Johnson v. Sthn. Pac. Co., 196 U. S. 1;
B. & O. R. Co. v. Interstate Com. Comm., 221 U. S. 612;
Illinois Central R. Co. v. Behrens, 233 U. S. 473;
Seaboard Air Line v. Horton, 233 U. S. 492.

The *Minnesota Rate Cases*, 230 U. S. 352, and the *Shreveport Rate Cases*, 234 U. S. 342, 205 Fed. 380, 391, in the former of which it is held that it is within the police power of the state to fix reasonable intrastate transportation rates for common carriers to all points within the state, including cities upon its boundaries, and notwithstanding the rates so fixed may be claimed to affect some discrimina-

tion as against interstate traffic and in favor of intrastate traffic; and in the latter of which it is held that such state-made intrastate rates may be superseded by order of the Interstate Commerce Commission *when expressly found by that body to constitute an unjust and unreasonable discrimination against interstate commerce.*

Neither all of these cases nor any of them go to the extreme necessary to support counsel's contention in this case. The statute here affects interstate commerce only slightly and indirectly by regulating the manner of use of an instrumentality not engaged in interstate commerce, the effect of which regulation upon interstate commerce is but slight and promotes rather than burdens interstate commerce. The statute here is a police regulation not inconsistent with any law of Congress, and relating to a subject matter upon which Congress has not acted.

Under the decision of the State Court, if a car of plaintiff in error is carrying only interstate traffic, the law does not apply. But counsel contend that the act, although held by the State Court to be merely an exercise of the police power of the State in behalf of state traffic, takes control of berths not occupied by intrastate passengers, and that all of the car not actually occupied by such passengers is an instrumentality of interstate commerce, and therefore beyond state control. Such narrow and literal reasoning, it seems to us, is self-destructive, for by its application the act may equally well be said not to be a regulation of any commerce at all, but simply a regulation of plaintiff in error and certain parts of its car, neither of which is literally commerce.

The true answer is that the statute is a police regulation of the conduct and equipment of plaintiff in error as a common carrier of intrastate passengers, directly and primarily for the health, comfort and convenience of such passengers. As for the unengaged and unoccupied upper berth, by the control of which the regulation is made directly effective, clearly that is not an instrumentality of interstate commerce until it is engaged or occupied by an interstate passenger, and, by the terms of the act, it is on that instant released from state control. Until that moment, it is simply for sale to *any* passenger, state or interstate. The only possible interference which the statute might work with interstate traffic is that some slight delay might be occasioned to an interstate passenger engaging such upper berth en route. Such interference or inconvenience would be but slight, contingent and incidental and in no sense direct or substantial.

It is, therefore, beside the point that a State may not, in the exercise of the police or taxing power, directly or substantially burden or obstruct interstate commerce. Nor is it material here that Congress might be held, under the Commerce Clause, to have power to assert a like or different control over these same unoccupied berths upon the ground that such control would promote or benefit interstate commerce carried in the same car with intrastate commerce, and that the exercise of such power by Congress would displace all state control, *for Congress has not asserted any such authority or control.* These considerations clearly distinguish the case at bar from those cited by counsel for plaintiff in error and to which we have just referred.

Counsel attempt to argue the contrary and refer to certain general provisions of the Interstate Commerce Act. But it is not enough, in order to exclude the power of the state, to assert generally that Congress has made the Interstate Commerce Act apply to sleeping cars. Counsel point to no express provision of the Act, no order of the Interstate Commerce Commission and no decision of any court which asserts any federal control with respect to the *subject matter dealt with in the statute here.*

We are referred only to Section 1 of the Interstate Commerce Act, which defines the term "common carrier" to include sleeping-car companies, and the term "transportation" to include cars and other vehicles and makes it the duty of carriers to furnish "such transportation" upon reasonable request therefor, and to section 3, which prohibits "undue or unreasonable" discrimination. Not by the widest stretch of construction, to say nothing of the strict construction which must be applied to a penal statute, could it be held that the language of sections 1 and 3, or any other provision of the Interstate Commerce Act, imposed upon plaintiff in error any duty to provide ventilation in its sleeping cars or to so regulate its berths within the cars as to promote the health, comfort and convenience of passengers. For all of any word in the Interstate Commerce Act to the contrary, the plaintiff in error may neglect entirely to ventilate its sleeping cars and may suffocate its passengers, provided only it does so without "undue or unreasonable" discrimination, and without charging an unjust or unreasonable rate.

It is well settled by the decisions of this Court that, until Congress acts *specifically* upon the subject matter, the State may fully exercise its police power in the regulation of common carriers and even though such regulation incidentally affects interstate commerce.

In *Hennington v. Georgia*, cited *supra*, the contention which counsel here urge was pressed upon this Court in opposition to a statute of that state prohibiting the operation of freight trains therein on Sunday and this Court held that, although the statute in that case operated incidentally to interfere with the free movement of interstate commerce, such state legislation as an exercise of the police power was not prohibited by the commerce clause of the Federal Constitution in the absence of conflicting legislation by Congress. Upon an instructive and somewhat extended review of its prior decisions, (163 U. S. 306-317), touching the subject, the Court in conclusion, speaking through Mr. Justice Harlan, resolved the question in the following language:

> "Local laws of the character mentioned have their source in the powers which the state reserved and never surrendered to Congress, of providing for the public health, public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time, or to a limited extent, they cover the field occupied by those engaged in such commerce." (pp. 317-318.)

The decision of this Court in *New York etc. R. Co. v. New York*, 165 U. S. 628, should be decisive of the interstate commerce question in this case. Indeed,

the decision in that case, we think, goes much further than is necessary to sustain the statute here, as it has been construed and limited by the Supreme Court of the State. The statute in that case prohibited the use of stoves for heating passenger cars in the state of New York, and applied, with minor exceptions not necessary to note here, to all passenger cars operating in the state, whether carrying interstate or intrastate passengers, and whether operating exclusively within the state or coming into the state from without, or passing out of the state into other states. It was contended there as here that the statute was an interference with interstate commerce and that it could not be sustained without sustaining the power in adjoining states to establish conflicting regulations upon the same subject, greatly to the embarrassment of interstate commerce. In the decision by a unanimous court, it was held that the statute was valid notwithstanding these objections and in the course of the opinion it is said: (Italics ours.)

"According to numerous decisions of this court * * * sustaining the validity of state regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, *in the absence of national legislation* covering the subject, to forbid under penalties the heating of passenger cars in that State, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, *Gibbons v. Ogden*, 9 Wheat. 1, 211, *the mere grant to Congress of the power to regulate*

commerce with foreign nations and among the States *did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health,* the lives and the safety of their people." (p. 631.)

And of the contention that conflicting state regulations might be enacted which would interfere with interstate commerce, it is said:

"These possible inconveniences cannot affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace *any inconsistent regulations* of the States covering the same ground." (pp. 632-633.)

To the same effect are many recent decisions in this Court.

Missouri Pac. Ry. Co. v. Larabee Mills, 211 U. S. 612, 620, 624, and cases there cited;
Western Union Tel. Co. v. Crovo, 220 U. S. 364, 372;
Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 421;
L. & N. Ry. Co. v. Kentucky, 183 U. S. 503, 518-519;
M. K. & T. Ry. Co. v. Harris, 234 U. S. 412, 417-419, and cases cited;
Atlantic Coast Line v. Georgia, 234 U. S. 280, 290-294;
Minnesota Rate Cases, 230 U. S. 352, 396-397, 402-412, 417, 432-433;

Louisville & N. Ry. Co. v. Garrett, 231 U. S. 298, 319;
Missouri Pac. Ry. Co. v. Kansas, 216 U. S. 262, 283-284.

The case of *Hall v. DeCuir*, 95 U. S. 485, cited upon brief by counsel for plaintiff in error, is distinguishable from the case at bar and from *New York etc. R. Co. v. New York, supra*, in this—that the state statute involved in *Hall v. DeCuir*, instead of applying merely to appliances or facilities of the carrier and hence only indirectly affecting interstate passengers, sought directly and expressly to regulate and control the disposition upon board vessel of such interstate passengers, and is spoken of as an example of *direct* interference in later decisions. *Wabash etc. Ry. v. Illinois*, 118 U. S. 557, 570-572; *Minnesota Rate Cases*, 230 U. S. 352, 416. So far as *Hall v. DeCuir* is not distinguishable from *New York etc. R. Co. v. New York*, it must be taken as overruled by the latter case.

In *Missouri Pac. Ry. Co. v. Larabee Mills, supra*, is quoted from *Cleveland etc. Ry. Co. v. Illinois*, 177 U. S. 514, 516-517, a succinct statement of numerous decisions of this Court in which the exercise of the state authority is sustained, notwithstanding its incidental or indirect effect on interstate commerce, in the absence of specific action by Congress, 211 U. S. 621-623. In the *Larabee Mills Case* the Court goes further and holds that Congressional action merely conferring upon the Interstate Commerce Commission general authority, though embracing the same subject matter over which state control is asserted, is not such action by the Federal government as precludes the exer-

cise of state authority, but there must be in addition *specific and inconsistent* exercise of Federal authority by the Interstate Commerce Commission. Thus, even conceding the contention of counsel that the Interstate Commerce Act is broad enough to confer upon the Interstate Commerce Commission power to establish any regulation of plaintiff in error's sleeping car business touching the subject matter of the Wisconsin Upper Berth law (which contention we hold is manifestly untenable), still the Wisconsin statute is not void under the Interstate Commerce Act, but may be enforced *until superseded by specific action on the subject by the Interstate Commerce Commission.* Upon this point this Court, in the opinion in *Missouri Pac. Ry. Co. v. Larabee Mills, supra,* speaking through Mr. Justice Brewer, holds: (Italics ours.)

> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. *But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission.* Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undis-

turbed. In other words, *the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens.* Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. *Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed.*" (p. 623.)

As compared with the regulation in that case (a writ of mandamus issued out of the State Court requiring the carrier to transfer and deliver carload freight, embracing both interstate and intrastate traffic), the regulation in the case at bar is far more clearly incidental only in its effect upon interstate commerce. The only exercise of authority by the Interstate Commerce Commission which is suggested by counsel for plaintiff in error as precluding the exercise of the state police power here involved is that the Interstate Commerce Commission has prescribed the rates to be charged by the plaintiff in error for the use of upper and lower berths by interstate passengers, but such regulation of rates is in no wise inconsistent with and bears no relation to the duty imposed on plaintiff in error by the Wisconsin Upper Berth law. The rate fixed by the Interstate Commerce Commission for upper berths is, of course, the rate or charge which plaintiff in error is authorized to exact for the *use and*

occupancy of such upper berths by interstate passengers—including, according to plaintiff in error's regulations, two passengers (Agreed Record, p. 21)—with the attendant services and privileges.

The fixing of such a rate clearly does not *require* the plaintiff in error to subject the occupant of a lower berth in intrastate commerce to unnecessary discomfort or inconvenience by keeping such upper berth open and down. Nor does the fixing of such rate prevent plaintiff in error closing such upper berth in obedience to a state law, unless such passenger will engage such upper berth and pay the tariff rate prescribed for its *use and occupancy* in order to have it closed.

An exercise of Federal power does not preclude the exercise of State authority upon a *kindred* subject matter or an instrumentality of Commerce *merely in the same class*, but the exercise of Federal power to have that effect must be *specific* and operate upon the *same* thing. Thus, in *Atlantic Coast Line v. Georgia, supra*, the headlight case, it is held that, although Congress and the Interstate Commerce Commission had prescribed numerous regulations with respect to safety appliances to be used on the cars, including locomotives, of interstate carriers, and whether used in intrastate or interstate commerce, *Federal authority having established no specific regulation as to the kind of locomotive headlight to be used, it was competent for State authority, until action by Congress on that specific subject, to do so as to locomotives operated within the state, including those engaged in interstate commerce.*

And again, in *M. K. & T. R. Co. v. Harris, supra,* it was held that although Congress had, by the Carmack Amendment, superseded state legislation *fixing the liability* of common carriers for loss and damage to interstate shipments, it was still within the power of the State to prescribe a statutory *remedy* for enforcing such liability until such time as Congress should act *specifically* on *that* subject. And it is said:

> "These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In *Reid v. Colorado,* 187 U. S. 137, 148, the Court, speaking by Mr. Justice Harlan, said: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that "In the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnancy or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot v. Davenport,* 22 How. 227, 243.'" (pp. 418-419.)

As for the contention that the statute here as applied to intrastate traffic is an invalid discrimination against interstate passenger traffic, we refer to the argument made in the second division of our brief that such discrimination, if any there be, is

not unjust or unreasonable and arises wholly out of the limitation upon the power of the state, as held by its highest court, precluding it from making the law apply equally in behalf of interstate passengers. Moreover, we submit, upon the authority of the *Minnesota Rate Cases*, the *Shreveport Case* and the *Larabee Mills Case*, cited *supra*, that this contention of plaintiff in error will not be entertained here except after and upon an express and specific determination by the Interstate Commerce Commission that the Wisconsin Upper Berth law works an "undue or unreasonable" discrimination against interstate commerce, in violation of the Act to Regulate Commerce.

In the light of the foregoing, we submit that the State Court was right in holding that the statute here is not invalid under the commerce clause of the Federal Constitution as a direct regulation of or interference with interstate commerce, and that, so far as it may affect interstate commerce at all, that effect is but slight and incidental, within the concurrent jurisdiction of Congress and the State, and that it is not inconsistent with or repugnant to any act of Congress or regulation of the Interstate Commerce Commission.

V.

The Wisconsin Upper Berth Law Is a Valid Exercise of the Power Reserved to the State Legislature By Section I of Article XI of the State Constitution to Alter the Corporate Franchise of the Plaintiff in Error.

It appears upon the record here (Agreed Record, pp. 3, 4) that the plaintiff in error is a corporation organized and existing under the laws of the State of Wisconsin. The constitutional authority under which the legislature enacted the laws under and by virtue of which the plaintiff in error exists and does business as a corporation is found in Section 1 of Article XI of the State Constitution, which, from the establishment of the State government, has always provided: (Italics ours)

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation can not be attained under general laws. *All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.*"

This power reserved has been always held by the Supreme Court of the State to apply to special acts of incorporation as well as to general laws.

Pratt v. Brown, 3 Wis. 603;
Madison, etc. Plankroad Co. v. Reynolds, 3 Wis. 287;
Blair v. Milwaukee etc. R. Co., 20 Wis. 254;
State v. Milwaukee Gaslight Co., 29 Wis. 454.

So that whether the plaintiff in error derives its corporate franchises and privileges from general or special acts of the legislature of Wisconsin is immaterial. Its corporate charter is in all respects subject to the power expressly reserved by the above quoted provision of the State Constitution, and its corporate charter, within the meaning of such a reservation to the legislature of the power to alter, amend or repeal the same, consists of all laws, special and general, which incorporate it, prescribe its rights, confer powers or impose duties upon it.

Attorney General v. Railroad Companies, 35 Wis. 425;
Commonwealth v. Railroad Company, 103 Mass. 254;
Mayor, etc. v. Railroad Company, 109 Mass. 103;
Bangor, O. & M. R. Co. v. Smith, 47 Me. 34;
Kaiser, etc. v. Curry, 155 Cal. 638;
Morris & E. R. Co. v. Commissioner, 37 N. J. Law 228, 237;
Attorney General v. Perkins, 73 Mich. 303;
State v. Anderson, 67 N. E. (Ind.) 207;
Garey v. Mining Co., 91 Pac. (Utah) 369;
Northern Cent. Ry. Co. v. Maryland, 187 U. S. 258;
Peik v. Railway Company, 94 U. S. 164.

It appears that the authority of the legislature under a power reserved to alter or amend the terms and conditions of a grant of special privilege is somewhat broader, as against constitutional objection urged by the grantee of such privilege, than the authority of the legislature to impose restraints and regulations generally in the exercise of the police power. Thus, while, as we have seen, the exercise of the police power by the legislature

is limited to such legislation as subserves a legitimate public purpose and is "reasonably adapted" to serve that purpose, under an express reservation of power to alter, amend or repeal such grant of special privilege, the legislature may make *any* amendment of the corporate charter which is consistent with the object and scope of the corporation and is *not unreasonably harsh and oppressive.*

Shields v. Ohio, 95 U. S. 319, 324;
Fairhaven & W. R. Co. v. New Haven, 203 U. S. 379, 388-9, and cases cited;
Stanislaus County v. Irrigation Co., 192 U. S. 201;
Spring Valley Water Works v. Schottler, 110 U. S. 347;
Attorney General v. Railroad Cos., 35 Wis. 425, 576;
State v. Railway Cos., 128 Wis. 449, 505.

The decisions of the highest court of the State have always given a broad scope and effect to this constitutional reserved power of the legislature, affecting not only the franchise of corporate existence, but including all franchises and privileges acquired by the corporation and emanating directly or indirectly from the legislature.

Madison, etc. Plankroad Co. v. Reynolds, 3 Wis. 287, 296;
Pratt v. Brown, 3 Wis. 603, 611, 615-6;
Nazro, et al. v. Merchants Mutual Ins. Co., 14 Wis. 295, 299-300;
Kenosha, R. & R. I. R. Co. v. Marsh, 17 Wis. 13, 17;
Whiting v. Sheboygan & F. R. Co., et al., 25 Wis. 167, 198;
Pick v. Rubicon Hydraulic Co., 27 Wis. 433, 440;
State v. Milwaukee Gaslight Co., 29 Wis. 454, 461;

Chapin v. Crusen, 31 Wis. 209, 215;
West Wis. R. Co. v. Trempealeau Co., 35 Wis. 257, 270-1;
Attorney General v. Railroad Cos., 35 Wis. 425, 569-574, 576, 579;
State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 184, 192-4, 195;
Ashland v. Wheeler, 88 Wis. 607, 616;
State v. Railway Cos., 128 Wis. 449, 505;
Manitowoc v. Man. & N. Tr. Co., 145 Wis. 13, 28-29;
La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 415, 417.

In *Pratt v. Brown, supra*, it was held that the legislature under the reserved power, in repealing the mill-dam law, had power to divest a corporation of its franchise of easement to flow lands acquired thereunder, the court in effect, saying:

> "Where the power of modification or repeal is reserved," either in the act of the legislature or under the constitution, "it is obvious that the grantees must rely, for the perpetuity and integrity of the franchises granted to them, solely upon faith of the sovereign grantor." (p. 611.)

In *Railroad Company v. Marsh, supra*, the State Court said: (Italics ours.)

> "Undoubtedly the legislature might, under this power, impose *new duties and new restraints* upon corporations in the prosecution of enterprises already undertaken. And provisions of this nature would be binding whether assented to or not." (p. 17.)

And again, in *State v. Milwaukee Gaslight Co., supra:*

> "The legislature retains control over such charters in this state, and has the power to take away *any* exclusive privilege or franchise which it may have improvidently granted." (p. 462.)

Such reserved power includes the right to repeal an exemption from taxation granted to a railway company. In *West Wis. R. Co. v. Trempealeau Co., supra,* it was said:

> "However this may be, certainly, under the paramount authority contained in the constitution, the right of the legislature to modify or repeal the law exempting the lands from taxation must be affirmed under the decisions of that court." (p. 268.)

In *Attorney General v. Railroad Companies, supra,* the State Supreme Court said:

> "The reserve power in our constitution is a positive provision entering into all charters under it, and must be construed as it is written." (pp. 576-7.)

And that, under this power,

> "* * * a corporate charter may be altered so as to make it different in detail, so long as the general identity of the corporation remains; so that it is varied, without entire change." (p. 577.)

This is merely a statement, in other words, of the proposition above made that under the reserved power the legislature may make any amendment of the corporate charter which is not inconsistent with the object and scope of the corporation.

Had the general laws under which the plaintiff in error was first incorporated provided that all upper berths in its sleeping cars, when neither occupied nor engaged, should be kept closed when the under berth was occupied or engaged, such provision would have been a part of its charter without question. A subsequent act repealing such provision, or putting it into the law for the first

time, alters or amends the charter. Under the reserved power the legislature can, within the limitations noted, put anything into the charter it could have placed there originally in creating the corporation.

Sinking Fund Cases, 99 U. S. 700, 720;
Fairhaven & W. R. Co. v. New Haven, 203 U. S. 379, 388-9.

Accordingly, it has been held that a law requiring a railroad company to build a station, although confiscatory as an exercise of the police power, is valid as an amendment to the corporate charter of the road.

Commonwealth v. Railroad Co., 103 Mass. 254;

See also

Mayor, etc. v. Railroad Co., 109 Mass. 103;
B. O. & M. R. Co. v. Smith, 47 Me. 34.

We quote the following pertinent language from *Commonwealth v. Railroad Co., supra*, page 258: (Parenthesis and italics ours.)

> "Whether a reasonable ground for interference (by way of alteration of the charter) is presented in any particular case *is for the legislature to determine; and their determination on this point must be conclusive.*"

The foregoing from *Commonwealth v. Railroad Co., supra*, is the equivalent, in effect, of the declaration of the Wisconsin Court, above quoted, from *Pratt v. Brown*.

That this power reserved in the State Constitution by the alteration of the corporate charter preserved to the State plenary power to regulate the services, uses and tolls of railway corporations cre-

ated by it was made a ground of the decision of this Court in *Olcott v. Supervisors*, 16 Wall. 678, where this Court said:

> "That the legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan & Fond du Lac Railroad Company is certain. This is a power reserved by the Constitution. The railroad can, therefore, be controlled and regulated by the State. Its use can be defined; its tolls and rates for transportation may be limited." (p. 694.)

Such reservation of power to alter, amend or repeal is given broad effect in the decisions of this Court and is held in many cases to permit, in the exercise of such reserved power, legislation affecting property rights which would scarcely be sustained as an exercise of the general police power of the state. In the cases *infra*, the power of alteration, amendment or repeal was held to confer upon the legislature authority to amend or repeal charters, franchises and privileges as follows:

To repeal an exemption from taxation conferred upon a railroad corporation.

Tomlinson v. Jessup, 15 Wall. 454.

Of the power reserved in this case, the Court said:

> "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. * * *
>
> "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state." (pp. 458, 459.)

To require a corporation to establish a sinking fund for the payment of its debts.

Sinking Fund Cases, 99 U. S. 700, 730.

To change the class entitled to elect trustees to manage a corporation and to divest incorporators of real property upon fair terms against their consent.

Close v. Glenwood Cemetery, 107 U. S. 466, 477.

To change and regulate transportation rates of a railroad corporation.

Shields v. Ohio, 95 U. S. 319, 324.

To deprive a waterworks corporation of representation upon a board of commissioners authorized to fix its rates.

Spring Valley Water Works v. Schottler, 110 U. S. 347, 353, 356.

To repeal the exclusive feature of a corporate franchise of a company incorporated to sell gas in a city named.

Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 270.

To repeal an immunity from taxation granted to a railroad corporation.

Northern Central R. Co. v. Maryland, 187 U. S. 258, 268-9.

To change the rate of return allowed irrigation companies under regulation of their rates by county commissioners.

Stanislaus County v. San J. C. & I. Co., 192 U. S. 201, 211-213.

To change and increase the burden imposed on a street railway corporation for the repairing of street paving.

Fairhaven R. Co. v. New Haven, 203 U. S. 379, 388-390.

To repeal the franchise of a corporation to be a body corporate, and to act as a body corporate under its corporate name.

Calder v. Michigan, 218 U. S. 591, 600.

To create a corporation commission and empower it to regulate railroad rates, and thus amend a railroad charter by which was expressly conferred upon the corporation authority to fix its own rates.

Matthews v. Corporation Commrs., 97 Fed. 400, 404.

To compel a state banking corporation to contribute to a fund to secure depositors in other banks against loss.

Bank v. Haskell, 219 U. S. 104.

To require a railroad corporation to pay its employees semi-monthly instead of monthly.

Erie R. Co. v. Williams, 233 U. S. 685, 700-702.

In view of the foregoing authorities, we submit that, even though this Court might be persuaded that the statute here is in excess of the general police power of the state to enact, it should nevertheless hold the statute constitutional as an exercise of the power reserved in the State Constitution to alter or repeal the corporate charter of the plaintiff in error. We think, however, that the plaintiff in

error has clearly failed to sustain the burden, which under the decisions of this Court it is held to have assumed, of demonstrating that the Wisconsin Upper Berth Law, sustained by the highest court of the State, is unconstitutional, either as exceeding the police power of the State, violating any right of plaintiff in error under the Fourteenth Amendment or invading the field of Federal authority under the commerce clause of the Constitution. Therefore, we believe that this Court should affirm the judgment of the State Court, which is brought here for review.

Respectfully submitted.

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and yet operates to take property cannot be justified on the ground that the party whose property it takes may be able to get an increase in the rates obtained for property not taken. The taking of property and a fixed right to compensation must coincide.

While the right of the State to regulate public carriers in the interest of the public is very great, it does not warrant unreasonable interference with the right of management or the taking of the carrier's property without compensation.

The reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation.

The statute of Wisconsin imposing penalties on sleeping car companies if, the lower berth of a sleeping car being occupied, the upper berth was let down before it was actually engaged, is unconstitutional under the due process clause of the Fourteenth Amendment as an arbitrary taking of property without compensation; nor can it be justified as a health measure under the police power of the State or as amendment or alteration of the charter of the corporation under the reserved power of the State in that respect.

152 Wisconsin, 348, reversed.

In 1911 the State of Wisconsin passed a statute imposing a penalty upon Sleeping Car Companies if,—the lower berth being occupied—the upper berth was let down before it was actually engaged. Suit was brought against the plaintiff in error for the recovery of the statutory penalty, based on the fact that on the night of August 11, 1911, James T. Hall boarded the Company's sleeping car at Portage, Wisconsin. He engaged lower berth, Section 11 and occupied the same, as an intrastate passenger, between Portage, Wisconsin, and Star Lake, Wisconsin. The upper berth of No. 11 was not engaged or occupied, but was let down and kept down during the night by the porter.

The Company answered that its cars, like those of others in the United States, were so arranged as to provide units consisting of lower berths, upper berths, sections, drawing rooms and compartments; that the lower berth and upper berth units are so arranged that when

prepared for occupancy each of said units is a compartment separated from all other space in the car; that the charge for the use of each of said units is fixed by tariffs established by the State of Wisconsin and by the Interstate Commerce Commission respectively. Under the Wisconsin law the rate from Portage to Star Lake was $1.50 for a lower berth, $1.20 for the upper berth, and $2.70 for the section. It was averred and admitted that Hall, while demanding of the defendant's conductor "that the upper berth be put back and kept there, so that he might have the use of the entire section, paid for the use of the lower berth only and did not offer to pay the tariff for the entire section."

The Railroad Company further averred that it operated sleeping cars over its system of more than 7,000 miles of interstate roads, and that the Interstate Commerce Commission had prescribed rates for each of said sleeping car units on trains running to and from the State of Wisconsin. The rate fixed for the upper was 80 per cent. of the charge for the use of the lower; the price for the whole section being the sum of the two rates. No order had been made by the Interstate Commission which prohibits the use of the upper berth while the lower berth is occupied. It was averred that a compliance with the Wisconsin statute would convenience the occupant of the particular lower berth only, and would not add to the comfort or promote the health, safety or convenience of the other occupants of the car, but would injuriously affect passengers occupying lower berths.

The Company insisted that the statute was arbitrary and unreasonable; not designed to accomplish a legitimate public purpose and contrary to natural justice. It claimed that the statute denied to it the equal protection of the laws; took its property without due process of law in violation of the Fourteenth Amendment and attempted to regulate interstate commerce.

There was a hearing before the court without a jury. Some of the averments in the Railroad's answer were admitted to be true. In addition witnesses were sworn whose testimony—admitted over objection—was to the effect that—while the Company had a pecuniary interest in having the upper berth kept down when the lower was occupied yet,—such lowering was necessary to secure the comfort of the occupant of the lower berth and to prevent him or her from being wakened or disturbed if it became necessary to put down the upper berth and arrange it so that it could be occupied by a passenger who had purchased such upper space during the night. The evidence was to the effect that the opening of the curtains, the glare of the light, the noise of lowering the berth, the work of arranging the bedding for the upper berth and securing the holding wires would necessarily inconvenience the man or woman occupying the lower berth; deprive him or her of the privacy to which they were entitled and interrupt the rest and sleep to secure which they had engaged the berth.

There was evidence that an ordinary sleeping car was better ventilated than an ordinary passenger coach, said to be due to the fact that the coach not only carried more passengers but did not have the ventilating appliances in use on sleeping cars.

There was in addition much evidence, admitted over objection, to prove the methods by which and the extent to which sleeping cars were ventilated. It appeared that a car of ordinary size contained about 5,000 cubic feet of air and that, by means of a series of suction ventilators, operated by the movement of the train, the air therein was sucked through openings in the top of the car. The faster the movement the more rapid the suction. By measuring the air escaping through the ventilators, it had been shown that when the train was running at 35 miles an hour the air in the sleeping car was renewed every two minutes. This air was replaced by that coming through doors, end

openings for ventilating purposes, screens or windows as the case might be. There was also testimony that when the upper berth was down and the curtains closed the air came in and went out of the lower berth through windows, screens, air spaces, and numerous openings between the curtain and the bed.

There was evidence that while the circulation in the lower berth was not so good as that in the aisle, yet the air in the car and in such lower berth was not injurious to health as demonstrated by repeated chemical analyses of samples of air taken from such lower berths, from the aisles and from other portions of the cars. There was evidence, and contention based on common knowledge, that the letting down of the upper berth did not affect the health or convenience of the occupants of the car or of either berth. This was demonstrated by the absence of injurious effects and the fact that lower berths with the upper berths down had thus been constantly used by travellers since sleeping cars were invented.

There was further evidence that the car in question was arranged substantially like those operated by sleeping car companies throughout the United States. In all of them the upper berth was regularly put down when the lower was occupied, unless the whole section was engaged by one person. There was a further contention that this was true in every State in the Union,—no one of which prohibited the letting down of the upper when the lower was occupied.

The court found as a fact—

"That the closing of upper berths in sleeping-cars has very little effect upon the circulation of air in such sleeping-cars when all lower berths are made up and ready for occupancy.

"That the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths in sleeping-cars.

"That the closing of the upper berth will be a convenience to the person occupying the berth below the same and will add to the comfort of such person alone and not to that of the public generally.

"That the defendant has a right to charge for the use of the space occupied by the upper berth and that such right is the property of the defendant."

He concluded, as matter of law, that the State was not entitled to recover the penalty and dismissed the complaint. The case was then taken to the Supreme Court of Wisconsin, which (152 Wisconsin, 348) said that "'the trial court held that the evidence showed a compliance with the act would affect the convenience and comfort of the traveling public in but a slight degree,' but that . . . the court's view of the evidence was evidently the result of the court's erroneous idea of what, in the legal sense, is essential to present an occasion or exigency involving the general welfare." The court further said "that in the light of common knowledge the evidence in the case tends to show that the effects of the regulation contribute to the comfort and convenience of the traveling public and thereby contribute to promote their health and general welfare," that the regulating "statute was a legal exercise of the police power;" and that the regulations only incidentally affect interstate commerce. The "law permits berths to be occupied and used when any person desires them and thus the defendant is secured against loss for services it may be able to furnish the public. . . ." It thereupon reversed the judgment of the trial court. The Railroad Company then brought the case here assigning as error that the judgment sustaining the statute deprived it of property without due process of law, interfered with its management of cars and made a discrimination between the privileges accorded state and interstate passengers in the same car at the same time.

Mr. Frank B. Kellogg, with whom *Mr. Burton Hanson* and *Mr. Gustavus S. Fernald* were on the brief, for plaintiff in error:

Chapter 272 of the 1911 laws of Wisconsin deprives plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws in taking its property for public use without compensation, and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States.

Chapter 272 of the 1911 laws of Wisconsin is a regulation of commerce among the States, and is void under § 8 of Art. I of the Constitution of the United States.

Numerous authorities of this and other courts support these contentions.

Mr. Walter Drew, Deputy Attorney General of the State of Wisconsin, with whom *Mr. W. C. Owen*, Attorney General of the State of Wisconsin, was on the brief, for defendant in error:

The highest court of the State has construed the statute and held it constitutional.

The Wisconsin Upper Berth Law is a legitimate exercise of the police power of the State in behalf of the public health and welfare.

The law does not violate any rights of the plaintiff in error guaranteed by the Fourteenth Amendment nor is it unconstitutional as a regulation of interstate commerce.

The law is a valid exercise of the power reserved to the state legislature by § 1 of Art. XI of the state constitution to alter the corporate franchise of the plaintiff in error.

Numerous authorities of this and other courts support these contentions.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

There have been two statutes in Wisconsin relating to

letting down the upper berth when the lower was occupied. The first [1] left the matter to the decision of the occupant of the lower berth. The second [2] absolutely prohibits the upper from being let down before it is engaged or occupied.

Concerning the act of 1907, which provided that the occupant of the lower "should have the right to direct whether the unoccupied upper should be opened or closed," the Supreme Court (*State* v. *Redmon*, 134 Wisconsin, 89, 103) held that the statute was "not a police regulation, but an unwarranted interference with property rights; an attempt . . . to give any person at his option who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof; an obvious . . . attempt . . . to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guarantee that no person shall be . . . deprived of life, liberty or property without due process of law." . . . "It follows that the arbitrary appropriation in the name of law of the space of an upper berth in a sleeping car for the greater comfort and safety, as regards the health of the occupant of the lower berth at his option, . . . is highly oppressive. . . . ."

1. But the language of the Act of 1911, now under re-

[1] "An act . . . relating to the health and comfort of occupants of sleeping-car berths.

"SEC. 1. Whenever a person pays for the use of a double lower berth in a sleeping-car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction." Laws of 1907, c. 266.

[2] "1. Whenever a person shall engage and occupy a lower berth in a sleeping-car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied." Laws of 1911.

view, does not remove the fundamental objection to that class of legislation. For as the State could not authorize the occupant of the lower berth to *take* salable space without pay, neither can the present statute compel the Company to *give* that occupant the free use of that space until it is actually purchased by another passenger. The owner's right to property is protected even when it is not actually in use, and the Company cannot be compelled to permit a third person to have the free use of such property until a buyer appears.

2. While this principle is recognized, it is said that this Act of 1911 was not passed for the purpose of benefiting the occupant of the lower berth, but as a health measure and in the interest of all the occupants of the car. But the statute does not purport to be a health measure, and cannot be sustained as such. For if lowering the upper berth injuriously interfered with the ventilation of the car and the health of the passengers it would follow that upper berths should not be lowered; and if it was harmful to let down the uppers it would be even more harmful to permit additional passengers to come into the car and occupy them. The testimony of witnesses and common knowledge coincide with the trial court's finding of fact that the lowering of upper berths does not endanger the lives, health or safety of persons occupying the lower berth and that keeping the upper closed will not add to the comfort of the public generally. *Lake Shore &c. Ry.* v. *Smith*, 173 U. S. 692. There are some inconveniences and discomforts incident to traveling on a sleeping car, but none of those resulting from the lowering of the upper berth are of a character that can be treated as a nuisance either in law or in fact. For lowering the upper berth is not only not treated as a nuisance or a serious inconvenience and discomfort to passengers, but the language of the statute itself recognizes that the sleeping car company might lawfully sell all of the upper berths and have each of them

occupied. The same is true of the order of the State Commission fixing a rate of $1.50 for the lower berth, $1.20 for the upper berth, and $2.70 for the section. This treats that the space in the section is salable, as a whole or in parts; and, if the space is thus lawfully salable, it is property entitled to protection.

3. The State Supreme Court cited *Lawton* v. *Steele*, 152 U. S. 133; *Lake Shore & M. S. Ry.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *North Carolina Corp. Comm.*, 206 U. S. 1; *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628; and after discussing the extent of the police power and the conditions under which it can be exercised, held that it was a reasonable exercise of such power to prohibit the upper berth from being lowered if not engaged or occupied, saying that "if compliance with this [statutory] command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the Company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. *Sweet* v. *Rechel*, 159 U. S. 380, 400.

4. The plaintiff also insists that the requirement that the upper berth should not be let down until actually engaged also deprives the Company of its right of management and prevents it from conducting its business so as to secure the privacy of the man or woman occupying the lower berth. It is not necessary to refer to the evidence on that subject because it is a matter of common knowledge that to let down the upper berth during the night would

necessarily be an intrusion upon the privacy of those occupying lower berths. For the glare of the lights and the noise of lowering the upper berth would disturb any except the soundest sleepers. In this respect the statute would lessen the ability of the Company to furnish the place of sleep and rest which it offers to the public. A sleeping car may not be an "inn on wheels," but the operating company does engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the Company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public. The right of the State to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation. *Lake Shore & Michigan Ry.* v. *Smith*, 173 U. S. 684; *Northern Pacific Ry.* v. *State of North Dakota*, 236 U. S. 585; *State of Washington ex rel. Oregon R. R.* v. *Fairchild*, 224 U. S. 510, 529; *Missouri Ry.* v. *Nebraska*, 164 U. S. 403, 417; *Great Northern* v. *R. R. Commission*, just decided, *ante*, p. 340.

5. In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific* v. *R. R. Commission*, 140 Wisconsin, 157, and the *Water Power Cases*, 148 Wisconsin, 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example in *Shields* v. *Ohio*, 95 U. S. 324, it was said

that "the power of alteration and amendment is not without limit. The alterations must be reasonable . . . and consistent with the scope and object of the act of incorporation." . . . Again in *Stearns* v. *Minnesota*, 179 U. S. 223, 259, it was held that the reserved right to amend a corporate charter "does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law." *Lake Shore &c. Ry.* v. *Smith*, 173 U. S. 690; *Stanislaus Co.* v. *San Joaquin Co.*, 192 U. S. 201; *Sinking-Fund Cases*, 99 U. S. 720; *Miller* v. *State*, 15 Wall. 498; see also *Delaware, Lackawanna &c.* v. *Board of Public Utilities*, 85 N. J. L. 28, 38, where it was held that, under such a power, the Company could not be required to furnish free transportation to certain designated officials. This conclusion makes it unnecessary to discuss the assignments relating to interstate commerce.

The judgment is reversed and the case remanded to the Supreme Court of Wisconsin for further proceedings not in conflict with this opinion.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.